





REPORTS OF CASES

DECIDED IN THE

N.D.

SUPREME COURT

OF THE

STATE OF NORTH DAKOTA

JOSEPH COGHLAN

REPORTER

VOLUME 45

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BY JOSEPH COGHLAN, SUPREME COURT REPORTER

FOR THE STATE OF NORTH DAKOTA.



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THESE REPORTS.

HON. A. M. CHRISTIANSON, Chief Justice.

HON. LUTHER E. BIRDZELL, Judge.

HON. RICHARD H. GRACE, Judge.

HON. JAMES E. ROBINSON, Judge.

HON. H. A. BRONSON, Judge.

JOSEPH COGHLAN, Reporter.

J. H. NEWTON, Clerk.

1871



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REPORTER'S NOTE.—The judicial redistricting act reducing the number of judicial districts from twelve to six became effective on July 1st, 1919, at which time there were three additional judges appointed, the present system requiring fifteen judges, whereas the old system required but one judge for each of the twelve districts.

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CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF
NORTH DAKOTA

JENS GLEIN, Guardian of the Person and Estate of John H. Stammen, Incompetent, Respondent, v. MRS. A. L. MILLER, Appellant.

(176 N. W. 113.)

Vendor and purchaser—receivers—appointment of receivers on ex parte showing where substantial rights are involved should not be made.

Where a vendor, under a contract for deed which contained no acceleration clause, attempted to cancel the contract under chapter 151, Sess. Laws of 1917, declaring in the notice that the contract would be canceled unless the whole of the remaining instalments were paid within six months, it appearing that the defendant had made substantial payments and that at the time of the first attempted cancellation the only default was in the nonpayment of taxes; and where, after the expiration of six months from the first notice, the vendor served notice upon the purchaser to vacate the premises and began forcible entry and detained proceedings in justice court, which were transferred to the district court; and where, upon an *ex parte* showing, the district court appointed a receiver to take possession of the property, collect rents, etc., it is *held*:

- (1) The order appointing the receiver was improvidently made.
- (2) Though an order appointing a receiver be improvidently made, it may not be violated with impunity, and one may be adjudged guilty of contempt for its violation.

Opinion filed January 17, 1920.

45 N. D.—1.

Appeal from the District Court of Ward County, *Leighton, J.*

Affirmed in part and reversed in part.

McGee & Goss, for appellant.

"The weight of authority supports the view that an action of unlawful detainer does not lie against a vendee in possession under a contract of purchase." 11 R. C. L. 1143; *Linder v. Warnock*, 91 Kan. 272, 137 Pac. 962, Ann. Cas. 1915C, 315, and note.

"An action of unlawful detainer cannot be brought against one claiming the premises in question under a contract to purchase." 13 Am. & Eng. Cyc. Law, 2d ed. 767; *Chicago Co. v. Skupa*, 16 Neb. 341, 20 N. W. 393; *Alderman v. Biekan*, 25 Kan. 658; *Mason v. Delancy*, 44 Ark. 444; *Keller v. Klopfer*, 3 Colo. 132; *Griffith v. Collins*, 116 Ga. 420, 42 S. E. 743; *Hall v. Jackson*, 77 Iowa, 201, 41 N. W. 620; *Bramwell v. Trower*, 92 Kan. 144, 139 Pac. 1018; *Hay v. Connelly*, 1 A. K. Marsh, 393; *Jack v. Carneal*, 2 A. K. Marsh, 518; *Reeder v. Bell*, 7 Bush. (Ky.) 255; *Dunham v. Townsend*, 110 Mass. 440; *Young v. Ingle*, 14 Mo. 426; *Dawson v. Dawson*, 17 Neb. 671, 24 N. W. 339; *Grouhousky v. Long*, 20 Neb. 362, 30 N. W. 257; *Worthington v. Woods*, 22 Neb. 230, 34 N. W. 368; *Malloy v. Malloy*, 24 Neb. 766, 40 N. W. 285; *Young v. Columbia Invest. Co.* 77 N. J. L. 410, 72 Atl. 35; *Burnett v. Scribner*, 16 Barb. 621; *People v. Bigelow*, 11 How. Pr. 83; *Burkhart v. Tucker*, 27 Misc. 724, 59 N. Y. Supp. 711; *Parker v. Allen*, 84 N. C. 466; *Hughes v. Mason*, 84 N. C. 473; *Hausen v. Morrison*, 146 N. C. 248, 59 S. E. 693; *Smith v. Kirchner*, 7 Okla. 166, 54 Pac. 439; *Carlisle v. Prior*, 48 S. C. 183, 26 S. E. 244; *Cunningham v. Ammerman*, 3 Tex. App. Civ. Cas. (Willson) § 352.

The plaintiff or person petitioning for the appointment of a receiver must, as a first requisite, present a prima facie case of right to recover, and unless that is done the order appointing a receiver may be attacked and disregarded as void by anyone. *Goshen Woolen Mills v. Bank*, 150 Ind. 279; note in 72 Am. St. Rep. 32; *State v. District Ct.* 21 Mont. 135, 69 Am. St. Rep. 645; *Freer v. Davis* (W. Va.) 94 Am. St. Rep. 910.

The law is well settled in this state by repeated decisions of this court, that an affidavit upon information and belief is wholly insufficient upon which to base constructive criminal contempt proceedings,

and that no jurisdiction is acquired thereunder. *State v. McGahey*, 12 N. D. 535, 97 N. W. 865; *Kaeppler v. Bank*, 8 N. D. 411, 79 N. W. 869; *State v. Root*, 5 N. D. 494, 67 N. W. 590, and such is the established rule in other states. Citing *Freeman v. Huron*, 8 S. D. 435; *Thomas v. People*, 14 Colo. 254, 9 L.R.A. 569; *Batchelder v. Moore*, 42 Cal. 412; *Ludden v. State* (Neb.) 48 N. W. 61, and other cases; *State v. Newton*, 16 N. D. 151, 112 N. W. 52.

"To authorize the appointment of a receiver, the complainant must have an apparent cause of action upon which there is a likelihood of recovery coupled with the fact of imminent danger of peril to the property." Citing many authorities, among them *State v. Bank*, 57 Am. St. Rep. 209; *Ft. Payne v. Iron Co.* 96 Ala. 472, 38 Am. St. Rep. 109; *Albany Co. v. So. Agr. Works*, 76 Ga. 135, 2 Am. St. Rep. 26; *Elwood v. Bank*, 41 Kan. 475; *Ryder v. Bateman*, 93 Fed. 15; *Flagler v. Blunt*, 32 N. J. Eq. 523; *Norris v. Lake*, 89 Va. 513; *Cofer v. Echerson*, 6 Iowa, 502; *Levenson v. Elson*, 88 N. C. 182.

"It is not proper to appoint a receiver on the petition of one whose complaint shows no right of ultimate recovery in the action." *Goshen Woolen Mills v. Bank*, 150 Ind. 279; *Freer v. Davis*, 94 Am. St. Rep. 910.

"A receiver should never be appointed merely upon the ground that the measure can do no harm." 72 Am. St. Rep. 32, citing *Orphan Asylum v. McCartee*, Hopk. Ch. 435; *Vlundheim v. Moore*, 11 Md. 374.

It is absolutely essential to a valid conviction for contempt that interrogatories be filed specifying the fact and circumstances of the offense charged against a defendant accused of contempt, and that the accused must be required to make answer thereto. *Noble Twp. v. Aasen*, 10 N. D. 264.

John J. Coyle (*Edward T. Burke*, on oral argument), for respondent.

BIEDZELL, J. This is an appeal from an order denying a motion to dismiss receivership and contempt proceedings which was entered after a hearing upon an order to show cause why the defendant and appellant should not be punished for contempt. The facts necessary to an understanding of the case are as follows: On January 3, 1916,

one John Stammen entered into a contract with the defendant to sell to her certain property in the city of Minot for a consideration, as expressed, of "\$7,000 and other valuable considerations," payable \$1,000 in cash, \$500 on the 3d days of January, 1917, 1918, and 1919, respectively, and the balance of \$4,500 on January 3, 1920. There was no acceleration clause in the contract, but it was expressly provided that upon the default in making any payment, or in the performance of the other covenants, the party of the first part might, at his option, by written notice, declare the contract canceled, whereupon the second party agreed to peaceably surrender the possession of the premises. In a notice of cancelation dated October 23, 1918, Glein, who appears herein as plaintiff in the capacity of guardian of Stammen, incompetent, set forth a default arising through the neglect of the defendant to pay the 1916 and 1917 taxes amounting to \$631.30, and declared an election to treat as due the whole of the balance on the contract, amounting to \$5,765.35. The defendant is notified that for failure to pay the latter amount, together with the taxes, within six months, the contract will be canceled. After the expiration of six months from this notice a notice to vacate was served upon the defendant, which was followed by an action in forcible entry and detainer in justice court. The answer of the defendant in that action set forth her claims under the contract, and denied that the contract had been canceled. It pleaded the lack of jurisdiction of the justice court to entertain a forcible entry and detainer action on account of the equitable title being involved, and the action was ordered transferred to the district court by order dated May 24, 1919.

On May 29th, upon an *ex parte* application of the plaintiff and solely upon the affidavit of the plaintiff's attorney, together with the transcript and papers filed in justice court, an order was entered appointing a receiver to take possession of the property, collect rents, etc. It appears that the defendant did not heed the order appointing the receiver and comply with it by turning over possession, whereupon on June 18th, an order to show cause was issued directing the defendant to appear and show cause why she should not be punished for contempt. It appears that there was no hearing on this order, although a return was served on plaintiff's counsel on the return day of the order in which it was asked that the order be vacated on the ground that the

court was without jurisdiction to make the order appointing the receiver. Later, on August 12th, another order to show cause was issued, based upon an affidavit showing continued violations of the order appointing the receiver and directing him to take possession. Upon the return day the defendants appeared and moved the dismissal of the receivership and contempt proceedings, contending that the receivership proceedings were void as being had *ex parte* and without sufficient facts shown as a foundation. The pendency of the forcible entry and detainer proceedings was also set up in addition to defendant's interest in the property which she claimed by virtue of the contract. Upon the hearing the court entered the order from which this appeal is taken.

The appellant complains of two provisions of the order: First, it is claimed that the court erred in denying the motion to dismiss the receivership and vacate the proceedings therein; second, that the court erred in ordering and adjudging the defendant to be guilty of contempt, imposing a fine of \$5 and a suspended sentence of twenty days in jail, conditionel on the defendant refraining from further interference with the receiver.

From the affidavits and indorsements upon the contract it appears that the defendant, before the service of the notice, had paid about \$2,000 and that she was making instalment payments of \$50 a month prior to the service of the cancelation notice upon her, the last payment of \$30 being made in August, 1918. As stated above, there was no acceleration clause in the contract, hence no foundation for the attempted exercise of an option to declare the entire balance due. The attempted cancelation, therefore, was not in accord with the statute, N. D. Sess. Laws 1917, chap. 151. It was needlessly and illegally oppressive. Since this is the foundation for the receivership proceedings, they should not be looked upon with great favor, and the fact that the appointment of the receiver was without notice to the defendant is one which greatly weakens the legal validity of the order. In *Grandin v. LaBar*, 2 N. D. 206, 50 N. W. 151, the correct rule applicable to such matters was stated as follows (page 215): "It is doubtless true that receivers are sometimes—though very rarely—appointed *ex parte*. Our statute (Comp. Laws, § 5017) contemplates such a possibility. But to justify such a summary proceeding the facts and circumstances must create a very grave exigency. . . . In suits between conflicting claimants of land, especially between par-

ties claiming under legal titles, a receiver will not ordinarily be appointed.' 3 Pom. Eq. Jur. § 1333." In the instant case there is reason to believe that the value of the property has increased very materially since it was sold to the defendant, that it is worth between ten and twelve thousand dollars and there can be no doubt that the claim made by the plaintiff upon the defendant in the notice of cancellation was excessive. It also appears that the only papers upon which the order appointing the receiver was based are the unverified complaint, signed by the plaintiff's attorney and filed in justice court, and the affidavit of the same attorney in which some of the facts are set up as being within his knowledge and some upon information and belief. In these circumstances, we are of the opinion that the order appointing the receiver was improvidently made and that it should be reversed.

It does not follow, however, from the fact that the order was improvidently made that it was absolutely void. In fact the implication of the holding in *Grandin v. LaBar*, supra, is that jurisdiction exists in the district court for appointment of receivers *ex parte* in proper cases. To hold that an order improvidently issued can be violated with impunity is to invite litigants to resort to the use of force sufficient to maintain their rights as they understand them to be. Such a policy should not be adopted in a system of law that prides itself upon having a remedy for every wrong. Hence that portion of the order which adjudges the defendant guilty of contempt and imposes a fine of \$5 is affirmed. That portion, however, which imposes a suspended jail sentence of twenty days must be reversed because it is conditioned upon her refraining from further interfering with the possession of the receiver. His possession must cease by virtue of the dismissal of the receivership proceedings.

The order of this court is that that portion of the order appealed from, which denies the defendant's motion for a dismissal of the receivership proceedings be reversed, that the motion be allowed and the receivership proceedings dismissed, and that the portion adjudging the defendant guilty of contempt and fining her \$5 be, and the same hereby is, affirmed. The appellant is entitled to recover costs on this appeal.

CHRISTIANSON, Ch. J., and ROBINSON, J., concur.

BRONSON and GRACE, JJ., concur in the result.

T. K. STRAND, Respondent, v. ALFRED LARSON, Appellant, and
J. E. ELSEBERRY, Garnishee.

(176 N. W. 736.)

**Army and Navy — discharged soldier may take advantage of State
Moratorium Act within the period of time prescribed in the act.**

The State Moratorium Act (Laws 1918, chap. 10), is available to a soldier
who has been in the active military service of our government, even after his
discharge, for the period of time prescribed in the Act.

Opinion filed January 19, 1920.

Action upon an account against a former soldier in the active military
service; from a judgment rendered in favor of the plaintiff, the
defendant has appealed.

Judgment reversed and action ordered dismissed.

Albert Weber, for appellant.

The vital question in interpreting a statute is the legislative intent.
Granger v. Lorenzen, 28 S. D. 295, 133 N. W. 259; *State ex rel. Linde*
v. Packard, 25 N. D. 317; 6 R. C. L. 102-111.

Bagley & Thorpe, for respondent.

BRONSON, J. This is an action against a former soldier. He has
appealed from a judgment rendered thereupon. The facts are stipu-
lated. The sole question involved is the interpretation to be placed
upon the state Moratorium Act. Laws 1918, chap. 10.

The defendant was in the active military service of our Federal
government in the recent war, from June 23, 1918, until February 5,
1919, when he was honorably discharged, at Camp Dodge, Iowa. The
causes of action are for moneys loaned or advanced, by the plaintiff,
to the defendant, in January and February 1918, amounting to \$74.

Action thereupon was instituted, in justice's court, in May, 1919;
the plaintiff also garnisheed moneys due the defendant and claimed to
have been earned since his discharge from the active military service.

NOTE.—On validity and construction of war legislation in nature of moratory
statute, see comprehensive note in 9 A.L.R. 6.

Pursuant to objection made by the defendant, that court, upon trial, dismissed the action. Appeal thereupon was taken to the district court, and in July, 1919, upon the stipulated facts, the trial court ordered and rendered judgment for the plaintiff, holding that the defendant was not entitled to the benefit of the state Moratorium Act.

The trial court in support of its order filed a memorandum decision wherein it construes the Moratorium Act to apply only to persons while engaged in the active military service of our Federal government, contending that the act throughout its terms speaks alone in the present tense; that if the act was intended to protect those who had been in the military service it would have been easy for the legislature so to state. The appellant herein, who has relied in the lower courts upon the protection of the Moratorium Act, contends that the act, enacted for the protection of those who offered their services and their lives in the present great war, is available for those who were in such active military service during the entire time specified in the Moratorium Act.

In *Thress v. Zemple*, 42 N. D. 599, 9 A.L.R. 1, 174 N. W. 84, this court determined that the state Moratorium Act applied in favor of one engaged in active military service, for the period of time prescribed in the act. In that case the defendant was in the active military service from February 8, 1918 to November 25, 1919. A judgment had theretofore been rendered against him in December, 1916. A new trial had been granted in June, 1917, upon which an appeal was taken to this court. Pursuant to proceedings subsequently had in this court, the trial court, in October, 1918, entered judgment against the soldier. This court held such action erroneous and directed that no further proceedings be taken during the time the United States is engaged in the present war and for an additional period of one year, unless otherwise ordered by the trial court, pursuant to the terms of the Moratorium Act.

The question here involved is the right of a soldier, who has been in the active military service, after his discharge, to avail himself of the provisions of the Moratorium Act for and during the period of time prescribed in the act.

The Moratorium Act (§ 1.) specifically provides that no proceeding shall be had or taken for the recovery of any indebtedness against any person in the active military service of our government during the time

the United States is engaged in the present war, and for an additional period of one year. Upon the construction as given by the trial court, and as contended by the respondent, this section would mean that, immediately upon the discharge of a person so engaged in the active military service, proceedings might be immediately initiated to prosecute or realize upon all causes of action, pending cases, and judgments then existing.

The Moratorium Act (§ 6) further specifically provides, with respect to taxes, that no proceeding shall be taken for the collection thereof until the expiration of the period of time mentioned in § 1. Again, pursuant to the holding of the trial court and the contention of the respondent, this section would apply only during the time that the soldier was in the active military service.

The Moratorium Act (§ 7) further provides that in any action or proceeding sought to be taken after the close of the period provided for in § 1 of the Act, the period of military service shall be excluded in computing the statutory limitation.

Sections 6 and 7 of the act have an important bearing in arriving at the legislative intent in the enactment of this legislation. Furthermore, in arriving at the legislative intent, it is highly proper to consider the purposes and objects sought to be accomplished through the Moratorium Act.

The legislation was enacted when the great war was then in course of progress. Our Federal government was then calling into active service, in the defense of our country, men from all walks of life, and requiring them necessarily to leave their families, their business, and their properties. Wisely, indeed, did the legislature of this state determine that, under these circumstances, it was not only its patriotic duty, but highly essential, to extend protection to the interests of our soldiers at home, while they were fighting for our country abroad. Properly, furthermore, the legislature evinced an intent to consider subordinate the rights of creditors of such soldiers, so far as they concerned claims against them. The legislative intent, under such circumstances, to extend a protection, not merely during the time of actual service, but for a specific period of time, is evinced throughout the act, recognizing, apparently, the evident necessity of a period of rehabilitation for the soldier even after the cessation of the active military serv-

ice. It is indeed a strained construction therefore to maintain that it was the legislative intent that this act should apply only to the soldier while he was engaged in the active service of our government, and that immediately after his discharge he should become subject to all the claims, causes of actions, and judgments that might have existed, or have accumulated prior to, or during the time, of his absence. No hardship is imposed upon creditors requiring them to wait during the period of time specified in the Moratorium Act comparable to the services rendered by our soldiers deservedly to be recognized in the present war. It is our opinion, therefore, that the intent of the Moratorium Act is to permit the entire time specified in the act to be available to a person who has been engaged in the active military service of our government. The judgment is reversed, and the action ordered dismissed, with costs to the appellant.

GRACE and BIRDZELL, JJ., concur.

ROBINSON, J. I dissent on the ground that Congress had ample authority to pass all acts necessary to protect the soldiers. There is no reason for a state to supplement the acts of Congress by impairing the obligation of contracts.

CHRISTIANSON, Ch. J. (concurring). The only question presented for determination in this case is one of construction of the state Moratorium Act. The question of the constitutionality of the act has in no manner been raised. Nor was it raised in *Thress v. Zemple*, 42 N. D. 599, 9 A.L.R. 1, 174 N. W. 85. I am frank to confess that my mind is not free from doubt in this case; but I am not prepared to say that the interpretation placed upon the Moratorium Act in the opinion prepared by Mr. Justice Bronson is erroneous. Such interpretation is in accord with the views expressed in *Thress v. Zemple*, supra.

J. S. JOHNSON, Appellant, v. FERDINAND ENGELHARD,
Respondent.

(176 N. W. 134.)

Process—service of summons on nonresident—court acquires no jurisdiction where service does not comply with the statute.

1. The plaintiff, a resident of North Dakota, commenced an action against the defendant, a resident of Wisconsin, by the issuance of a summons, and after the issuance of the summons, attached certain lands of the defendant in Burleigh County, North Dakota. No attempt was made to publish the summons, the plaintiff sending the same to the chief of police of Oconomowoc, Wisconsin, by whom it was served upon the defendant personally. No other effort was made to serve the summons or complaint upon the defendant within sixty days after the issuance of the warrant of attachment.

Held that, under the statutes referred to in the opinion, the district court of Burleigh county, North Dakota, in which the action was commenced, acquired no jurisdiction of the defendant, and properly dismissed the action.

Action—commencement of action—when action is deemed commenced.

2. The ordinary action is commenced when a summons is issued and served upon the defendant. An action is commenced in cases in which attachment is permitted when the summons is duly issued.

Action—service of summons without the state—how made.

3. Personal service of a summons can only be made within the state. When it is served without the state, in cases where it is permitted by a statute to be so served, service must be made by publication as provided by law.

Opinion filed November 8, 1919. Rehearing denied January 21, 1920.

This is an appeal from an order of the District Court of Burleigh County, North Dakota, *W. L. Nuessle, J.*,

Order affirmed.

W. L. Smith, for appellant.

Distinguishing attachment action from the ordinary action see: *Smith v. Nicholson*, 5 N. D. 426, 67 N. W. 296; *Goldstien v. Peter Fox Sons Co.* 22 N. D. 636; 4 Cyc. Attachments; 2 R. C. L. ¶ 60 of Attachments.

NOTE.—Authorities passing on the question of acquiring jurisdiction over foreign corporation by service of process are collated in a note in 70 L.R.A. 530.

"In some jurisdictions the remedy by attachment is held to be purely *in rem*, and the statute requiring notice to be given to the debtor is deemed to not be for the purpose of giving the court jurisdiction over the subject-matter, but to permit the debtor to have an opportunity to protect his rights. *Paine v. Mooreland*, 15 Ohio, 435, 45 Am. Dec. 585; *Hudson v. Blaufus*, 22 Iowa, 323.

Further as to the meaning that has been placed upon the word "deemed" in different cases see: *Burrell Twp. v. Pittsburg C. of P.* 62 Pa. 472; *Robinson v. Cleveland City R. Co.* 7 Ohio Dec. 324; *Jackson's Succession*, 47 La. Ann. 1089, 17 So. 598; *Chew v. Egbert*, 14 N. J. L. 446; *Thompson v. Cragg*, 24 Tex. 582.

Miller, Zuger, & Tillotson, for respondent.

The proceedings by attachment are statutory and special, and the provisions of the statute must be strictly followed or no rights will be acquired thereunder. *Ireland v. Adair*, 12 N. D. 32; *Rhode Island Hospital Trust Co. v. Keenery*, 1 N. D. 413; *Roberts v. Enderlin Invest. Co.* 21 N. D. 601.

The summons and complaint must both be served upon the defendant personally outside of the state within sixty days after the filing of the affidavit for publication, to be of any effect. If not so made the action shall be deemed discontinued. Comp. Laws 1913, § 7431; *First Nat. Bank v. Holmes*, 12 N. D. 38, 94 N. W. 764.

Substituted service other than by publication means that it can be done in the manner required by § 7432, *supra*. A less degree of service is not sufficient. *Roberts v. Enderlin Invest. Co.* 21 N. D. 594, 132 N. W. 145.

GRACE, J. The plaintiff attempted to bring an action against the defendant in which he sought to recover \$6,000 damages for the alleged violation of a written contract. The defendant is a resident of the city of Oconomowoc, Waukesha county, state of Wisconsin.

The plaintiff's attorney issued a summons which was served upon the defendant personally by the chief of police of Oconomowoc. The complaint was not served with the summons; the summons recited the complaint would be filed with the clerk of the district court of Burleigh county. It was dated February 14, 1919.

On the 17th day of February, 1919, plaintiff filed in the office of the

clerk of the district court of Burleigh county, a verified complaint in which \$6,000 damages are claimed, and at the same time filed an affidavit, stating the defendant was not a resident of the state, that he was a resident of the city of Oconomowoc, Wisconsin, and further therein stated that personal service of the summons could not, in this state, be made upon the defendant.

On February 17, 1919, the plaintiff filed an affidavit of attachment; he also filed an undertaking therein in the sum of \$6,000, and on that day procured a warrant of attachment, under which the sheriff of Burleigh county attempted to levy and attach certain real estate in Burleigh county, North Dakota, described as follows, to wit: Section 35, Township 139, Range 78; the E. $\frac{1}{2}$ of the E. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$, the N. W. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$, the S. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$, the S. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$, the S. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of N. E. $\frac{1}{2}$, the E. $\frac{1}{2}$ of S. E. $\frac{1}{4}$, and the N. W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ of Section 29, Township 139, Range 80.

The notice of the alleged attachment was filed with the register of deeds, and in it was described the land sought to be attached. The writ of attachment was not personally served upon the defendant. At the request of the attorney for plaintiff, Section 35 was released from the alleged attachment. No publication of the summons was made. The plaintiff relies upon what he terms the personal service of the summons above mentioned, but which, as we shall presently see, was not personal service. No personal service of the complaint upon the defendant was made within sixty days after the filing of the affidavit for publication.

The plaintiff, on the 2d day of May, 1919, more than sixty days after the warrant of attachment issued, served a copy of the complaint upon the defendant; this was, however, subsequent to the time when the defendant had procured from the court an order directed to the plaintiff to show cause on the 26th day of April, 1910, why the action sought to be commenced should not be dismissed for want of jurisdiction.

The sole question in the case is one of jurisdiction. The plaintiff sought to get jurisdiction of the defendant by publication of the summons under § 7429, Comp. Laws 1913, and the filing of a writ of attachment against certain land. Under § 7420, an action is commenced by the issuance and service of a summons and jurisdiction is acquired when it is served in the manner prescribed by law.

In an action on contract or judgment for the recovery of money only, for the wrongful conversion of personal property, or for damages arising out of contract or otherwise, the plaintiff, at or after the commencement thereof, may have the property of the defendant attached, in the cases provided for in §§ 7537 and 7538, Comp. Laws 1913; and where an attachment is thus procured, an action is, in such case, deemed to be commenced from the time a summons is duly drawn and signed with the intention that it be served. A summons, thus issued, is sufficient to support and authorize the procuring of a warrant of attachment at any time after the issuing of the summons.

In cases where attachment is permitted, and the action is deemed commenced from the issuing of the summons, and though it be conceded it is sufficient to support an attachment issued after the action has been so commenced, no jurisdiction of the defendant is obtained unless the summons is served upon him.

The statutes provide the manner in which the summons may be served, which is by personal service thereof, in accordance with the provisions of the statute defining personal service, or service by publication, in accordance with the statute in cases where publication is permitted.

In this case the plaintiff has done neither. The defendant, at the time the action was commenced, was a resident of the state of Wisconsin. The only method by which the plaintiff could subject defendant to the jurisdiction of the courts of this state was by commencing an action by the issuance of a summons, attaching his property within this state, following this with a due and legal publication of the summons, and thereafter serving the summons and complaint upon the defendant in the manner prescribed by law; or, after a proper affidavit of publication was made, by making personal service of the summons within sixty days after the issuance of the warrant of attachment. The mere issuing of the summons, and thereafter the writ of attachment, and the filing of the notice of attachment in the office of register of deeds, and thereafter the service of the summons personally upon the defendant in Wisconsin, without first having complied with the requirement of the law as to publication up to the point where everything required for the publication of the summons is done, except the publication thereof, would not bring the defendant within the jurisdiction of the court.

We are dealing with the question of substituted service; the manner in which such service may be made is prescribed by statute. When substituted service is sought, the steps to be taken and rules to be followed are those prescribed by the statute, and it is only by following such statutory rule that jurisdiction may be obtained of the person in cases where substituted service is permitted, and is applicable.

Section 7431, Comp. Laws, reads thus: "After the affidavit for publication and the complaint in the action are filed, personal service of the summons and complaint on the defendant out of the state shall be equivalent to and have the same force and effect as the publication and mailing provided for in this chapter."

Under this section, each and every step required to be taken, if the summons were to be published, must also be taken to the point of publication before the personal service mentioned, is permissible. Unless all of such steps are taken, the personal service thus authorized, does not become equivalent nor have the same force and effect as the publication of the summons and the mailing of the summons and complaint in the manner provided for service by publication.

Section 7432, Comp. Laws, reads thus: "The first publication of the summons, or personal service of the summons and complaint upon the defendant, out of the state, must be made within sixty days after the filing of the affidavit for publication; if not so made, the action shall be deemed discontinued." This action refers to cases in which there is no attachment issued.

Section 7539, Comp. Laws, reads thus: "Within the meaning of the last two sections, an action shall be deemed commenced when the summons is issued, but personal service of such summons must be made or publication thereof commenced within sixty days after the issuance of the warrant of attachment."

The other sections referred to in the latter section are 7537 and 7538, which set forth the cases in which attachment may be issued.

The personal service mentioned in this section is governed by the statutes relative to substituted service by publication. All of the things required to be done for service by publication are, under this section, required also to be first done, where the personal service of the summons referred to in this section is made, with the single exception that the actual publication of the summons need not be made.

This case is governed by the provisions of § 7539 in regard to the time when the summons must be served, which is sixty days after the issuance of the warrant of attachment.

The plaintiff has utterly failed to serve the summons by publication. Personal service of it could be made only within this state.

The personal service which may be made without the state is a part of substituted service by publication. The summons served upon the defendant by the chief of police of Oconomowoc was a nullity and was void, for the reason that the preliminary, prerequisite steps and acts to be done by the plaintiff had not been taken and performed prior to the alleged personal service without the state. Hence there was no legal service of the summons by publication.

We are also of the opinion that it is necessary, in this case, within the sixty-day period, after the issuance of the attachment to serve upon the defendant, either by mail or personally, a copy of the complaint as provided in § 7430, or that he be served with it personally as provided in § 7431. This was not done.

It is clear that the summons was not served personally within the meaning of the statute regarding personal service, nor was it served by publication in the manner prescribed by the statutory law in that regard. Hence, the court acquired no jurisdiction of the cause of action nor of the defendant. It properly entered an order of dismissal of the action.

Such order appealed from is affirmed.

The respondent is entitled to statutory costs on appeal.

ROBINSON, BRONSON, and BIRDZELL, JJ., concur.

CHRISTIANSON, Ch. J. (concurring). The sole question presented in this case is whether the trial court erred in dismissing plaintiff's action.

Under our laws jurisdiction in an action is acquired by the service of a summons upon the defendant. Two modes of service are provided: Personal service, and service by publication. The manner in which personal service must be made is prescribed by § 7426, Comp. Laws 1913; and the conditions under which service may be made by publication are enumerated in § 7428, Comp. Laws 1913. The latter section provides:

"Service of the summons in an action may be made on any defendant by publication thereof upon filing a verified complaint therein with the clerk of the district court of the county in which the action is commenced, setting forth a cause of action in favor of the plaintiff and against the defendant, and also filing an affidavit stating the place of defendant's residence, if known to the affiant, and if not known, stating that fact, and further stating:

"1. That the defendant is not a resident of this state; or

"2. That the defendant is a foreign corporation, joint stock company, or association and has no agent or person in this state upon whom service may be made under the provisions of § 7426; or

"3. That personal service cannot be made on such defendant within this state to the best knowledge, information, and belief of the person making such affidavit, and in cases arising under this subdivision the affidavit shall be accompanied by the return of the sheriff of the county in which the action is brought, stating that after diligent inquiry for the purpose of serving such summons he is unable to make personal service thereof upon such defendant." Comp. Laws 1913, § 7428.

Section 7430, Comp. Laws 1913, provides that "*a copy of the summons and complaint* must, within ten days after the first publication of the summons, be deposited in some postoffice in this state, postage prepaid, and directed to the defendant to be served, at his place of residence, unless the affidavit for publication states that the residence of the defendant is unknown."

Section 7431, Comp. Laws 1913, provides: "After the affidavit for publication and the complaint in the action are filed, personal service of the summons and *complaint* upon the defendant out of the state shall be equivalent to and have the same force and effect as the publication and mailing provided for in this chapter."

Section 7539, Comp. Laws 1913, provides that in actions wherein a warrant of attachment is issued and properly seized thereunder, "an action shall be deemed commenced when the summons is issued, but personal service of such summons must be made, or publication thereof commenced within sixty days after the issuance of the warrant of attachment."

It is undisputed that the only service made upon the defendant in
45 N. D.—2.

this case was that a copy of the summons was handed to him within the state of Wisconsin. He did not receive a copy of the complaint.

Appellant contends that § 7539, Comp. Laws 1913, does not require the service of a copy of the complaint in a case where personal service of the summons is obtained out of the state. In my opinion this contention is wholly untenable. Section 7539 does not purport to define "personal service" or "service by publication," or to fix any other meaning upon those terms than that which is ascribed to them in other provisions of our laws. The section merely recognizes the fact that our laws provide for two modes of service, to wit: Personal service and service by publication. When it refers to personal service, it doubtless has reference to the service prescribed by § 7426, Comp. Laws 1913, which latter section by its express terms declares that "service made in any of the modes provided in this section shall be taken and held to be *personal service*." Service by the delivery of the summons and complaint to the defendant, personally, out of the state is simply a substitute for service by publication. *H. L. Spencer Co. v. Koell*, 91 Minn. 226, 97 N. W. 974; 19 Enc. Pl. & Pr. 610; 32 Cyc. 489.

It will be noted that our laws expressly require that when service is made out of the state, a copy of the complaint, as well as of the summons, must be served (§ 7431, *supra*); and that even in cases where the summons is actually published, a copy of the summons and *complaint* must be mailed to the defendant, if his residence is known. § 7430, *supra*. The object of these statutes is apparent. It was desired, in all cases where it was possible to do so, to give the defendant the information which the complaint necessarily would impart to him.

It is well settled that statutes providing for service of process upon persons who cannot be personally served within the jurisdiction must be strictly pursued in order to confer jurisdiction upon the court. 17 Enc. Pl. & Pr. 45; 19 Enc. Pl. & Pr. 611.

In *Roberts v. Enderlin Invest. Co.* 21 N. D. 594, 599, 132 N. W. 145, this court said: "Service of summons by publication is purely of statutory creation, and is effective only as the statute makes it so. Whatever the statute prescribes as a prerequisite condition cannot be dispensed with, and a failure to strictly comply with the provisions of the statute renders the attempted service fatally defective. When a proceeding is commenced to obtain service of the summons by publi-

cation, the defendant has a right to examine the records in the case and to govern his conduct accordingly. It is therefore necessary that proof of the right, under the statute, to make service of the summons by publication, should appear in the files and records of the action before publication of the summons is commenced."

In that action the court, also, had occasion to construe § 7539, *supra*. The court held that by virtue of that section "the lien of an attachment lapses and ceases to exist, unless the summons is served personally or the publication thereof commenced within sixty days after the issuance of the warrant of attachment." 21 N. D. 601.

I therefore agree with my associates that there was no service of the summons in this action in the manner and within the time provided by law, and that the trial court ruled correctly when it ordered that the action be dismissed.

STATE OF NORTH DAKOTA, Respondent, v. FRANK W.
HENDERSON, Appellant.

(176 N. W. 126.)

Criminal law — sufficiency of information to negative false pretenses:

1. The defendant was convicted upon an information which charged him with obtaining money under false pretenses; therein it was alleged that the defendant falsely represented that one Laughery was a civil engineer; that it was necessary to employ a competent civil engineer to perfect a preliminary survey for the proposed railway; that such preliminary survey was necessary in order to secure the necessary financial aid; that it was necessary in order to secure the services of Laughery for such purposes that he be paid in advance \$4,000. The information further negated the false pretenses as follows:

"Whereas, in truth and in fact the said pretenses and representations so made as aforesaid were false, untrue and fraudulent, and

"Whereas, in truth and in fact the said Laughery was not a civil engineer and was and is not familiar nor capable and competent of doing railway surveying or engineering and knew nothing of such work,"

It is held that such allegations sufficiently negative the allegations of the false pretenses.

Indictment and information — false pretenses — innuendo may be used.

2. Upon such information, it is held proper under the statute to allege by

way of innuendo facts and circumstances, part of which may be true, which serve as a basis upon which the false pretenses may operate in order to secure the money or property.

False pretenses.

3. In such action where \$4,000 in money belonging to the parties interested was put up in a bank, and the defendant secured the same as a method of convenience in the form of a draft, it is *held*, that the false pretenses exercised operated to deprive the parties of money.

False pretenses — proof.

4. In such action where the evidence discloses that the party whom the defendant represented to be a consulting engineer was a carriage and automobile painter, and at times a traveling salesman selling varnish, who had never studied civil engineering and knew nothing about it, it is *held* that the proof of the false representations of the defendant concerning the party as a consulting engineer covered, upon the subject-matter involved, the term "civil engineer."

Opinion filed November 24, 1919. Rehearing denied January 30, 1920.

The defendant was convicted in Burke County, *Leighton, J.*, for the crime of obtaining money under false pretenses. From a judgment and sentence rendered the defendant has appealed.

Affirmed.

Wolfe & Schneller, for appellant.

False representations may be made to bring about the payment of the money or the delivery of the property. Re *Cameron*, 44 Kan. 64, 24 Pac. 90; *State v. Williams*, 32 L.R.A.(N.S.) 420 and note.

Olaf Braatlien, State's Attorney Divide County, and *George P. Holmes*, for respondent.

The defendant cannot claim that the language of the information is not sufficiently specific to give him notice of what he was to prepare to defend. This is all that is required, and the language of the information specifically meets this requirement. 8 Ency. Pl. & Pr. 880, 881; *Com. v. Whitney*, 3 S. W. 533; *Baker v. State*, 120 Wis. 135, 97 N. W. 566.

It is not necessary to aver in express terms that the pretenses were false, or to negative them specifically. 8 Enc. Pl. & Pr. 881; *Britt v. State*, 9 Humph. (Tenn.) 31; *State v. Metsch*, 37 Kan. 222; *State v. Tripp*, 84 N. W. 546 (syllabus); 20 Standard Proc. p. 731, note.

A general averment that the pretense was false will be deemed sufficient after verdict. *State v. Luxton*, 65 N. J. L. 605; 2 Whart. Crim. L. pp. 1654, 1655.

"Consulting engineer" is "a scientific expert, consulted occasionally; one who is brought into conference about a case or a project, or some phase thereof." *Coppersmith v. Mound City R. Co.* 51 Mo. 357, 366; *State v. Doyle* (R. I.) 96 Atl. 610, 2 Words & Phrases, 1st series.

A delivery to a designated agent for his benefit is sufficient proof of the consummation of the offense by the defendant. *Bates v. State*, 103 N. W. 251; *Sandy v. State*, 60 Ala. 58; *Com. v. Taylor*, 105 Mass. 172; *Com. v. Karpowski*, 167 Pa. 225, 31 Atl. 572.

BRONSON, J. The defendant was convicted in the district court for obtaining money under false pretenses. From the judgment entered the defendant has appealed.

In January, 1917, a criminal information was filed charging the defendant with obtaining money and property from certain persons in connection with the promotion and construction of a proposed railway in northwestern North Dakota through false representations and pretenses concerning the qualifications of one Laughery, as a civil engineer and other false pretenses in regard thereto.

At the trial some evidence was introduced to establish the following facts: A large number of farmers residing in or near the counties of Divide and Williams, in northwestern North Dakota, were desirous of having a railroad constructed in such territory. The defendant took up the consideration of the matter with representatives of these farmers looking toward the promotion and construction of such railroad. Many meetings and conferences were held between the farmers, their representatives, and the defendant with reference to such promotion and construction. During such negotiations, conferences, including the preliminary contracts made, the defendant represented that he had the financial backing of a loan concern situated in Philadelphia who would finance the bonds for the proposed railroad providing it was feasible; that it was necessary in a preliminary way to have an actual survey made and a financial report of the practicability of such railroad from a financial view point; that it was further necessary that

the consulting engineer of the eastern concern be secured and his advance fees paid for purposes of determining these matters. It was arranged that \$7,000 be raised for such purposes and then the defendant falsely pretended that one W. C. Laughery was the consulting engineer of the eastern concern and that it was necessary to pay him in advance \$4,000 before he did any work. The defendant secured W. C. Laughery to work for him. He brought him up with him to the territory involved and introduced him as the consulting engineer from Philadelphia to many of the parties interested and at the various meetings. He made representations that it was necessary to pay such amount of \$4,000 to this person before he did any work. The parties interested in the promotion of the project raised the sum of \$4,000 in money and placed it in a bank at Crosby, North Dakota.

On March 27, 1916, pursuant to instructions received from the defendant, Laughery went to the bank for this money put up by the farmers. He requested and received therefor a draft of \$4,000 upon a St. Paul bank. Laughery was a witness for the state. He testified that he was then a traveling salesman for a varnish company, that he was a carriage painter and automobile painter; that this was about all the work he had done when not on the road traveling, that he never studied civil engineering; that he never did any engineering work of any kind; that the defendant offered him work; asked him to go with him up to this country to get statistics from elevators, lumberyards, etc., and when he got up there to go to a certain bank and get a draft for the defendant. That his salary was to be \$200 per month. The defendant advised Laughery to say that he was a consulting engineer from Philadelphia; that he was advised by the defendant to say, if any questions were asked him about civil engineering, to tell them that he could not say anything about it until the survey was made. He testified that after he received the draft he took it over to the hotel where the defendant was; there he indorsed it and gave it to the defendant. That he never received any of the money represented by the draft. That thereafter he went to different places with one of the farmers' committee to the elevators, the lumberyards, the implement dealers, and attended some meetings; that at several meetings both before and after the reception of the draft the defendant represented him to be the consulting engineer from Philadelphia. That, after this work was

done, he asked the defendant on the train when the defendant expected to start work on the railroad; that the defendant replied, "to hell with the railroad, if they never get their road until I build it they will be a long time building it."

That some report was made covering this preliminary information and survey of the road, which was prepared by the defendant, which was not looked over by him and was merely signed by him at the request of the defendant. The draft was again indorsed by one Budack and subsequently paid.

The general scheme, developed in the evidence for the construction of the railroad proposed, involved a financing by this eastern concern of the bonds to be floated and a financial support to be secured from the farmers interested along the line. A large number of exhibits were introduced, some disclosing the contract made by the defendant and the farmers' committee as representative of the proposed railroad corporation before and after its incorporation, setting forth the terms of the agreement to be performed by the defendant, Henderson. Later members of the farmers' committee ascertained that Laughery never was a civil engineer and never had been in the employ of such eastern concern. Thereupon the defendant was taken to task for his false misrepresentations; trips were made by parties to Philadelphia to visit the eastern concern and a real consulting engineer employed by the eastern concern finally was employed; he visited the section for the purpose of examining the project and made a report concerning the feasibility of the railroad upon which the eastern concern deemed the project not feasible and determined not to lend any financial aid. There is additional testimony in the record to the effect that the farmers' committee as well as many of the farmers interested were induced to put up and part with their money relying upon these false pretenses and representations made by the defendant. At the conclusion of the State's evidence, the defendant rested, and, without submitting any testimony, moved the court to advise the jury to return a verdict of not guilty upon many grounds. Upon this appeal the defendant has specified some 66 asserted grounds of error in the proceedings of the trial court. Indeed the court would be led to believe, from the number of objections and motions interposed by the defendant, that the proceedings of the trial court constituted merely a monument of error. The principal

contention of the defendant, in connection with the specifications of error urged, is that the information does not specifically allege a negation of some of the false pretenses set forth in the information. The defendant separates the false pretenses alleged in the information into four classes generally stated, viz.:

- (1) The representation made that Laughery was a civil engineer.
- (2) That it was necessary to employ a competent civil engineer to perfect a preliminary survey.
- (3) That a preliminary survey and estimate was necessary in order to secure the necessary financial aid.
- (4) That it was necessary in order to secure the services of Laughery for such purpose that he be paid in advance \$4,000.

Concerning the false pretenses as so alleged, the information negatives the same in the following language, to wit: "Whereas, in truth and in fact the said pretenses and representations so made as aforesaid were false, untrue and fraudulent, and whereas, in truth and in fact the said Laughery was not a civil engineer and was and is not familiar nor capable and competent of doing railway surveying or engineering and knew nothing of such work," the defendant contends that these allegations were not a specific negation of the false pretenses. The defendant contends that the information properly negatives only one of the alleged false pretenses, to wit, that W. C. Laughery was not a civil engineer; that therefore there was only one single issue which could be established and proven by the state; that every other such false pretense or representation was thereby eliminated; that furthermore there was no proof in the record of any false representation that said Laughery was a civil engineer; that the extent of the proof is to the effect that such Laughery was a consulting engineer. Under our statute (Comp. Laws 1913, § 9968) making it a crime to obtain from any person money by false pretenses, it is proper in a criminal information to allege more than one ground of the false pretenses made for the securing of the money, and it is also proper by way of innuendo to allege facts and circumstances, part of which may be true, which serve as a basis upon which the false pretenses may operate in order to secure the property. 19 Cyc. 396, 427; see 2 Whart. Crim. Law, 11th ed. p. 1655. This court is satisfied, upon the whole information so considered, that such allegations were sufficiently negated if the four

grounds stated be considered allegations of false pretenses. *Baker v. State*, 120 Wis. 135, 97 N. W. 566; *State v. Tripp*, 113 Iowa, 698, 84 N. W. 548; *People v. Fitzgerald*, 92 Mich. 328, 52 N. W. 726; 19 Cyc. 427.

We are also of the opinion upon this information that the last three so stated allegations of false pretenses may be properly considered as circumstances alleged by way of innuendo which afford a basis for the false pretenses exercised and consummated with regard to the procurement and the use of Laughery as a civil engineer, whereby the money was secured by the defendant. It indeed might be true upon this record that it was necessary to secure a preliminary survey; that it was necessary to employ a competent civil engineer; that it was necessary to secure necessary financial aid for the construction of such railway; that it was necessary to pay Laughery \$4,000 in advance for his services, if in fact he was a competent civil engineer. All of these things being true as to a competent civil engineer or a consulting civil engineer, in fact, might or did become a false pretense when applied to the operations and the representations concerning Laughery, a figurehead in fact, used by the defendant through a false pretense concerning him to secure the money of the persons interested in the construction of this railway.

We are satisfied that the contentions so urged by the defendant are without merit. That the defendant was fully apprised of the nature of the charge against him and had full opportunity to defend against such charge. The defendant further contends, however, that there is not proof of a false representation, that Laughery was a civil engineer; that the proof is that he was a consulting engineer, and that this variance is fatal. This objection indeed is without merit. In understanding the English language in application of terms upon this subject-matter involved there is no room for controversy, upon definitional grounds, that a consulting engineer means and includes civil engineering. Upon the motion of the defendant the state was compelled to elect to stand on the ground that the defendant secured money, instead of property, upon the false pretenses alleged. The defendant contends that no money was received by the defendant. Therefor, no case has been proved. Such objection indeed fails to distinguish between a draft which was secured by means of false pretenses and a draft which

is taken as a method of convenience after moneys have already been put up and secured for the benefit of the defendant by means of his false pretenses. The defendant further contends, however, that the parties involved entered into a specific contract and that the defendant performed, in accordance with the contracts made and pursuant to their terms. That, therefore, there could be no deceit or false pretenses where there was legal obligation to do the very things that were done. We are not satisfied upon the record that the contracts made between the parties did cover, as a matter of law, the subject-matter of the false pretenses. The court did not err in its instructions to the jury in this regard. We have examined the long record in this case considerably at length and we are satisfied after such examination that the defendant was accorded a fair trial and that the case was submitted to the jury upon instructions which fairly represented the law applicable and the rights of the defendant. It is ordered that the judgment be affirmed.

CHRISTIANSON, Ch. J., and BIRDZELL, ROBINSON and GRACE, JJ.,
concur.

SAMUEL DICKSON, by LeRoy S. Gilford, His Guardian ad Litem,
Appellant, v. L. S. SALISBURY, Respondent.

(177 N. W. 377.)

Judgment—entry of two judgments in same case—first judgment final—second judgment in same cause void.

A verdict was directed for defendant. The trial court made an order for judgment, reciting the direction of the verdict, and ordering judgment for costs in favor of defendant. On November 21, 1918, judgment was entered in conformity with the order, and notice of entry thereof served. On May 7, 1919, a second order for judgment was signed and judgment entered thereon. The second order and judgment are like the first, except that they recite that the action is dismissed.

It is held that the first judgment was a final determination of the rights of the parties; that the entry of the second judgment was of no consequence, and that no rights were affected thereby.

Opinion filed December 5, 1919.

Appeal from the District Court of LaMoure County; Honorable J. A. Coffey, Judge.

Judgment reversed and canceled.

James Manahan and Thomas & Sullivan, for appellant.

An appeal lies only from a judgment duly entered. An appeal does not lie from a verdict of a jury. *Clark v. Van Loon* (Iowa) 79 N. W. 88.

Where no judgment was entered on the verdict of the jury, an appeal will not lie. *Seven Valleys Book v. Smith* (Neb.) 61 N. W. 603.

Unless allowed by express statutory provision, a writ of error or appeal will not lie from the verdict of a jury without an entry of judgment thereon. 3 C. J. 600.

This court has held that there can be no effective judgment in this state until it is entered in the judgment book. *McTavish v. G. N. R. Co.* 8 N. D. 337; 4 N. D. 119; 20 N. D. 195; 23 N. D. 457; 26 N. D. 283.

A final judgment does not become such until entered by the clerk in the judgment book. *Re Weber*, 4 N. D. 119; *Dibble v. Hanson*, 17 N. D. 21.

The judgment entered November 20, 1918, being a judgment for costs only, was not a final appealable judgment. *Barnhouse v. Adams* (Iowa) 66 N. W. 826; *Little v. Gamble* (Neb.) 66 N. W. 849; *Smith v. Johnson* (Neb.) 56 N. W. 323; 3 C. J. 600; 137 Cal. 363.

Defendant's daughter was acting within the scope of her employment and within the course of her employment as her father's agent in driving the car. *Dennison v. McNorton*, 228 Fed. 401.

The presumption is that the party operating the machine is the agent of the owner. The burden of disproving this presumption is upon him. *Lynde v. Browning*, 2 Tenn. C. C. A. 262; *Birch v. Abercrombie*, 50 L.R.A. 67; *Stowe v. Marrie*, 147 Ky. 386; *Daily v. Maxwell*, 152 Mo. App. 415; *McNeal v. McKain* (Okla.) 126 Pac. 1742; *Collinson v. Cutter* (Iowa) 170 N. W. 421, 422; *Floetz v. Holt*, 124 Minn. 173; *Lenn v. Carlson*, 120 Minn. 286; *Kayser v. Van Nest*, 125 Minn. 277; *Uphill v. McCormick* (Minn.) 166 N. W. 788; *Johnson v. Evens* (Minn.) 170 N. W. 220; *Johnson v. Smith*, 173 Minn. 676.

Maxine Salisbury was using the car with the implied consent of

her father. *Ferris v. Sterling*, 214 N. Y. 249; *Erlich v. Heis* (Ala.) 69 So. 530; *Birch v. Abercrombie*, 74 Wash. 486, 33 Pac. 1020; *Denison v. McNorton*, 228 Fed. 401.

Knowledge and consent may be implied as well as expressed. *Lynde v. Browning*, 2 Tenn. C. C. A. 262.

The question of whether or not Miss Salisbury received express permission to use the car was for the jury. Specifications of Error XXIII. of insufficiency XI. and XII. *Birch v. Abercrombie*, 74 Wash. 486, 50 L.R.A.(N.S.) 59; *Long v. Bute*, 123 Mo. App. 204; *Rott v. Boston Ry.* 138 Mass. 420; *Taylor v. Modern Woodmen*, 72 Kan. 453; *Whalen v. Harrison*, 26 Mont. 326; *Wilson v. Royal Neighbors*, 139 Mich. 425; *Burleson v. Tinnin* (Tex.) 100 S. W. 350.

Doane & Porter and *Lawrence & Murphy*, for respondent.

The chauffeur or agent is not acting within the scope of his employment when he is using the machine for his own pleasure or business. *Slater v. Advance-Rumley Thresher Co.* 97 Minn. 305, 107 N. W. 133; *Stewart v. Barauch*, 103 App. Div. 577, 93 N. Y. Supp. 161; *Quigley v. Thompson*, 211 Pa. 107, 60 Atl. 506; *Jones v. Hoge* (Wash.) 92 Pac. 432.

The owner of an automobile establishment in which his son is employed as a clerk is not liable for the negligent operation of one of the machines by the son while using it for his own personal pleasure. *Reynolds v. Buck*, 127 Iowa, 601, 103 N. W. 946; *Lotz v. Hanlon*, 10 Ann. Cas. 732; *Maher v. Benedict*, 123 App. Div. 579, 108 N. Y. Supp. 228; *Mattei v. Gillies*, 12 Ann. Cas. 973; *Lembke v. Ady* (Iowa) 159 N. W. 1012.

A father is never liable for the wrongful acts of his minor son unless the acts were committed with the father's consent or in connection with the father's business. *Smith v. Davenport* (Kan.) 11 L.R.A. 492; *Doran v. Thompson* (N. J.) 19 L.R.A.(N.S.) 337; *Reynolds v. Buck* (Iowa) 103 N. W. 946; *Conestoga Traction Co. v. Haldy* (1912) 22 Pa. Dist. R. 124.

A parent is not liable for the torts of his minor children, when such acts are done without his authority, knowledge, or consent, and have no connection with his business and are not ratified by him, and are of no benefit to him. *Thibodeau v. Cheff*, Ann. Cas. 1912A, 585, note; *Mirick v. Suchy*, 74 Kan. 715, 87 Pac. 1141, 11 Ann. Cas. 366; *John-*

son v. Glidden, 11 S. D. 237, 74 Am. St. Rep. 795, 76 N. W. 933, 5 Am. Neg. Rep. 97; Dick v. Swenson, 137 Ill. App. 68; Pauley v. Draine, 9 Ky. L. Rep. 693, 6 S. W. 329; Bassett v. Riley, 131 Mo. App. 676, 111 S. W. 596.

A father is not liable for an injury inflicted by his automobile while being driven by his son, merely because of the relationship. Linville v. Nissen, 162 N. C. 95, 77 S. E. 1096; Loehr v. Abell, 174 Mich. 590, 140 N. W. 926; Roberts v. Schanz, 83 Misc. 139, 144 N. Y. Supp. 824; Notes to McNral v. McKain, 41 L.R.A.(N.S.) 775; Birch v. Abercrombie, 50 L.R.A.(N.S.) 59; White Oak Coal Co. v. Rivoux, Ann. Cas. 1914C, 1091.

An automobile is not *per se* a dangerous agency. Lewis v. Amorous, 3 Ga. App. 50, 59 S. E. 338; Shinkle v. McCullough, 116 Ky. 960, 105 Am. St. Rep. 249, 77 S. W. 196; Christy v. Elliott, 216 Ill. 31, 1 L.R.A.(N.S.) 215, 108 Am. St. Rep. 196, 74 N. E. 1035, 3 Ann. Cas. 487; Chicago v. Banker, 112 Ill. App. 94; McIntyre v. Orner, 166 Ind. 57, 4 L.R.A.(N.S.) 1130, 117 Am. St. Rep. 359; Indiana Springs Co. v. Brown, 165 Ind. 465, 1 L.R.A.(N.S.) 238; Smith v. Jordan, 211 Mass. 269, 97 N. E. 761; Hartley v. Miller, 165 Mich. 115, 33 L.R.A.(N.S.) 81; Slater v. Advance Thresher Co. 97 Minn. 305, 5 L.R.A.(N.S.) 598; Dailey v. Maxwell, 152 Mo. App. 675, 108 S. W. 1122; Danforth v. Fisher, 75 N. H. 111, 21 L.R.A.(N.S.) 93; Vincent v. Crandall, 131 App. Div. 200, 74 N. Y. Supp. 999; Steffen v. McNaughton, 142 Wis. 49, 26 L.R.A.(N.S.) 382, 124 N. W. 1016; Jones v. Hoge, 47 Wash. 663, 14 L.R.A.(N.S.) 216, 125 Am. St. Rep. 915, 92 Pac. 433; McNeal v. McKain, 41 L.R.A.(N.S.) 778, 779; 6 Labatt, Mast. & S. 6644, 6843.

No presumption arises from the fact that at the time of an accident a son was driving his father's automobile, that he was acting within the scope of his authority, which will cast upon the father the burden of showing the contrary. Hays v. Hogan, L.R.A.1918C, 715; McFarlane v. Winters (Utah) 155 Pac. 437; Zeer v. Bahnmaier (Kan.) 176 Pac. 326; 6 Labatt, Mast. & S. 6644; 46 L.R.A.(N.S.) 199.

ROBINSON, J. This is an action to recover damages by reason of a personal injury sustained by collision with an automobile. The court directed a verdict for the defendant and on that verdict two judgments

have been entered. On November 21, 1918, pursuant to an order of the court reciting the trial and verdict, a judgment was entered that the defendant do have and recover from the plaintiff the costs and disbursements of the action, taxed at \$237.50.

Now a judgment is a final determination of the rights of the parties in the action. Comp. Laws, § 7599. The first judgment showed such a final determination. It recites the verdict of the jury in favor of the defendant and the order for judgment on the same and the amount allowed as costs, but it seems counsel thought the first judgment not good enough, because it did not declare the action dismissed. Hence, on May 7, 1919, a second judgment was entered which is that the defendant have and recover judgment against the plaintiff dismissing the action and for \$237.50, his costs. Plainly the second judgment is no better than the first and it is in the form of an order for judgment.

This is an appeal from the second judgment. It was taken October 15, 1919, and after the first judgment had become final. The second judgment was not authorized and it must be reversed and canceled. After one judgment has been entered on a verdict, if it is in any way technically defective, it may be corrected on motion, but the court may not enter a succession of judgments and in that way extend the time for an appeal from the first judgment. The defendant erroneously moved to dismiss the appeal on the ground that the second judgment is wholly unauthorized and without jurisdiction. But that is cause for canceling and reversing the judgment, and not for dismissing the appeal.

The record is from beginning to end a very bunglesome affair. Hence, without reviewing the merits of the case, the second judgment must be reversed and canceled, and that will leave the first judgment in full force and effect.

Reversed and canceled.

CHRISTIANSON, Ch. J., and BIRDZELL, J., concur.

BRONSON, J. I dissent. The motion to dismiss the appeal herein should be denied.

This cause, an action for personal injuries, was tried before a jury, and, at the conclusion of plaintiff's case, pursuant to a motion made by

the defendant, verdict was directed by the court in favor of the defendant.

Pursuant thereto, on November 18, 1918, the trial court made its order for judgment, viz.: "It is hereby ordered, adjudged, and decreed, that the defendant do have and recover of the plaintiff the costs and disbursements of this action to be taxed by the clerk." Upon this order, on November 21, 1918, judgment was entered, viz.: "It is adjudged and determined that the defendant do have and recover of the said plaintiff the costs and disbursements of the action taxed and allowed in the sum of \$237.30 making a total judgment in the sum of \$237.30."

On March 11, 1918, the court stenographer made a full transcript of his shorthand notes covering the proceedings had at the trial. On May 21, 1918, the trial court settled the statement of the case. On June 8, 1918, service was admitted by the defendant of notice of motion to set aside the verdict and grant a new trial. On June 20, 1918, appeal was taken from judgment rendered on November 21, 1918. (This appeal was subsequently abandoned as parties stated on oral argument.) On March 27, 1919, notice of motion was made for an order for final judgment and for an order denying plaintiff's motion for a new trial returnable April 11, 1919.

On April 22, 1919, the trial court entered an order denying the motion for a new trial upon the ground that the motion was without merit and that the same had not been presented to the court within the time required by statute. On the same date the court also made an order which reads as follows:

"This action having been regularly placed on the calendar for trial at the regular term of the district court begun and holden at the court house in the city of La Moure, county of La Moure and state of North Dakota, on the 4th day of February, 1918, and having been reached in its regular order for trial, and a jury having been had and both parties having submitted oral and documentary evidence and having rested, and the court having on motion directed a verdict for the defendant, after argument of counsel, and the jury having delivered a verdict for the defendant in accordance therewith, which verdict is dated February 15, 1918; and the court having ordered an interlocutory judgment in favor of said defendant and against the said plain-

tiff for the costs and disbursements of this action, to be taxed by the clerk, which interlocutory judgment was docketed in the office of the clerk of said court on the 21st day of November, 1918:

"It is now on motion of Eugene F. Coyne, one of the attorneys for plaintiff:

"ORDERED that the defendant have judgment against the plaintiff in defendant's favor, upon the issues in this action, and for the sum of two hundred thirty-seven dollars and thirty cents (\$237.30), the costs so taxed by the clerk, and that said action be dismissed."

Pursuant thereto, on May 7, 1919, final judgment was entered for the costs and for dismissal of the action. From this judgment so rendered on May 7, 1919, appeal has been taken by the plaintiff to this court.

It is apparent that the first judgment entered in the trial court was irregular. The defendant, upon this motion, contends that the first judgment entered is a final judgment. In my opinion this contention cannot be sustained either upon the judgment as it reads, or upon the trial court's own interpretation thereof. The defendant is not in a position before this court to question the nature of the first judgment as interpreted by the trial court. There is nothing in this record to demonstrate that the defendant attempted to make the first judgment final by providing therein, in addition, for a dismissal of the action or to object to the form of this first judgment. The plaintiff consequently was placed in the position of acting at his peril either by appealing from the first judgment or of treating the same as the trial court so did. Upon the record in this case, the first judgment therefore should be treated as an interlocutory judgment for the purpose of this appeal just the same as the parties in the trial court did so treat it. See note in 60 Am. Dec. 427.

The plaintiff procured a transcript of the proceedings herein about March 11, 1918. This does not evidence an intention that the present appeal is to be termed tardy or dilatory. The first judgment was uncertain; it did not provide for a dismissal of the action; the plaintiff might well be uncertain as to its final character; the trial court did determine it to be interlocutory and entered a subsequent judgment which is final in its terms. Upon this record, as a matter of simple

justice and of law, the plaintiff is entitled to a hearing before this court on the merits.

GRACE, J., concurs.

On Petition for Rehearing, filed January 30, 1920.

PER CURIAM. Plaintiff has petitioned for a rehearing, and we have reconsidered the case. Such reconsideration has caused no change of mind on the part of any of the members of the court. The majority members are still of the opinion that the first judgment was a final judgment. On its face it showed that it was rendered pursuant to a verdict, which decided all questions of fact in the case. Hence, the second judgment was wholly unauthorized. *Miller v. Thompson*, 31 N. D. 147, 153 N. W. 390.

The majority members are, also, of the belief that the trial court properly directed a verdict in favor of the defendant.
Rehearing denied.

CHRISTIANSON, Ch. J., and BIRDZELL and ROBINSON, JJ., concur.

AMANDA LARSON, Respondent, v. CLARA B. SCHMIDT
RUSSELL, Appellant.

(176 N. W. 998.)

Damages — character and extent of injury a jury question.

In an action for personal injuries occasioned to the plaintiff by the alleged negligence of the defendant, consisting in allowing the veneered brick wall of a building to remain in such condition that it was likely to fall and injure persons in the vicinity; it appearing that the wall did fall, some of the bricks striking the plaintiff and inflicting injuries upon her head, back, and shoulders; plaintiff and experts testifying on her behalf claiming that her

NOTE.—That as a general rule the courts are reluctant to interfere with the verdicts of juries, for the reason that the law furnishing no legal rule for measuring the damages, the duty of determining the amount which should be awarded in a given case has been vested in the jury, as will be seen by an examination of the authorities collated in an exhaustive note in L.R.A.1915F, 30, on excessiveness of verdicts in actions for personal injuries other than death.

45 N. D.—3.

injury had resulted in a condition of permanent paralysis due to traumatic neurosis; the defendant and experts testifying on her behalf contending that the plaintiff's injuries were of a temporary character, and that she is not paralyzed, but afflicted with hysteria—the evidence is examined and it is *held*:

1. That the character and extent of the injuries of the plaintiff present questions of fact for the consideration of the jury.

Appeal and error — verdict on evidence authorizing different conclusions cannot be disturbed.

2. The evidence as to the injury being such that reasonable persons might draw different conclusions therefrom, the verdict of the jury cannot be disturbed.

Damages — \$26,000 for personal injury held not excessive.

3. On the supposition that the plaintiff was injured as claimed, and as there is substantial evidence tending to show, the damages awarded are not excessive.

Negligence — allowing condemned wall to remain in unsafe condition held actionable.

4. Where a wall had been condemned by city authorities as being unsafe, and the defendant owner had full knowledge thereof, and where it is not shown that the plaintiff knew of the defects, the negligence of the defendant in allowing the wall to remain in an unsafe condition is actionable at the suit of one who was injured while rightfully on the premises.

Landlord and tenant — lessee's obligation to make repairs held not to exonerate owner.

5. The obligation of a lessee to make repairs which does not relate specifically to the defect causing plaintiff's injuries does not exonerate the owner of the building from liability.

On Rehearing.

6. It was reversible error for the trial court to prevent the impeachment of certain witnesses, by refusing the defendant the right to show, upon their cross-examination, that, at the trial of certain other cases in the United States District Court, the subject-matter of which was wholly different to this, that it was found by that court that they had committed perjury in fact. It was also reversible error of the trial court, in preventing the defendant from showing, upon the cross-examination of such witnesses, what those facts were concerning which they gave such false testimony, and in denying defendant's offer of proof.

Opinion filed December 11, 1919. Judgment reversed on Rehearing February 14, 1920. Rehearing denied March 9, 1920.

Appeal from Cass County District Court, *A. T. Cole, J.*
Judgment affirmed.

M. A. Hildreth (*John Carmody*, of counsel), for appellant.

The verdict is excessive. It is not sustained by the evidence and indicates passion and prejudice, which vitiates the verdict; and on this ground alone a new trial should be granted. *Carpenter v. Dickey*, 26 N. D. 176, 143 N. W. 964; *Waterman v. Minneapolis, St. P. & S. M. R. Co.* 26 N. D. 540; *Rev. Codes* 1905, § 7063; *Pertello v. Missouri Pacific*, 117 S. W. 138; *Ice Co. v. Tamm*, 90 Mo. App. 202; *Gibney v. Transit Co.* 204 Mo. 704, 103 S. W. 43.

We think the ends of justice will be subserved by a new trial. *Johnson v. Great Northern R. Co.* 107 Minn. 285, 119 N. W. 1061; *Landro v. Great Northern R. Co.* 114 Minn. 162, 130 N. W. 553; *Bucher v. Wisconsin C. R. Co.* 139 Wis. 597, 120 N. W. 518; *Louisville & N. R. Co. v. Reaume*, 107 S. W. 290; *Gibney v. St. Louis Transit Co.* 103 S. W. 43.

No verdict of the size of the verdict in this case should be permitted to stand based upon such testimony. *Johnson v. Great Northern R. Co.* 107 Minn. 285, 119 N. W. 1061; *DePow v. Chicago & N. W. R. Co.* 138 N. W. 43; *Schwartzbaeur v. Great Northern R. Co.* 112 Minn. 356, 128 N. W. 286; *Oberg v. N. P. R. Co.* 136 Fed. 981.

The opinion of the experts for the plaintiff that she was permanently injured was not based on anything substantial, but was purely speculative. *Bucker v. Wisconsin C. R. Co.* 139 Wis. 597, 120 N. W. 518; *Morrison v. Northern P. R. Co.* 74 Pac. 1064; *Goken v. Dallugge*, 99 N. W. 819; *Goken v. Dallugge*, 103 N. W. 287.

To entitle a plaintiff to recover present damages, for apprehended future consequences, there must be such a degree of probability of their occurring as amount to a reasonable certainty that they will result from the original injury. *Curtis v. Rochester & S. R. Co.* 18 N. Y. 541; *Filer v. New York C. R. Co.* 49 N. Y. 45; *Clark v. Brown*, 18 Wend. 229; *Lincoln v. Saratoga & S. R. Co.* 23 Wend. 435; *Strom v. New York L. R. & W. R. Co.* 96 N. Y. 305; *Shoemaker v. Sonji*, 15 N. D. 518, 108 N. W. 42; *Elzig v. Bales*, 112 N. W. 540; *Chicago M. & St. P. R. Co. v. Lindeman*, 143 Fed. 946; *Hemenway v. Washington Water Power Co.* 95 Pac. 269; *Louisville & N. R. Co. v. Reaume*, 107 S. W. 290.

Considering the plaintiff's earning capacity the verdict was excessive and unreasonable. *Louisville & N. R. Co. v. Reaume*, *supra*;

Louisville Southern R. Co. v. Minogue, 12 Ky. L. Rep. 378, 14 S. W. 357; Rooney v. New York N. H. & H. R. Co. 53 N. E. 435; Peterson v. Roessler & H. Co. 131 Fed. 156.

BIRDZELL, J. This is an action to recover damages for personal injuries alleged to have been sustained by the plaintiff through the falling of a portion of the wall of a building owned by the defendant. It appears that on February 3, 1915, the plaintiff was working in the capacity of a domestic servant, in the rooming house occupying a building known as the Ely Block and Annex on Broadway in the city of Fargo. The portion of the building which was used as a rooming house had been leased to her brother-in-law, one Papas or Papamanoles, and the lease assigned by the latter to Emma Larson, the mother of the plaintiff. On the date mentioned, while the plaintiff was thus employed, she had occasion to go down the steps of a stairs on the outside at the rear of the building, and while making the descent a section of the veneered brick wall fell out, some of the bricks striking the plaintiff and inflicting injuries upon her. The case was tried in the district court of Cass county in January, 1918, and a verdict rendered in favor of the plaintiff for \$26,000. The defendant later moved for judgment notwithstanding the verdict, or, in the alternative, for a new trial. This appeal is from the order of the trial court denying a new trial and from the judgment entered on the verdict. Upon this appeal the appellant has made ninety-four assignments of error.

It will be unnecessary to consider all of the assignments, but such of them will be referred to as appear to have most merit.

It is first contended that the verdict is so excessive as to indicate that it was rendered under the influence of passion or prejudice, thus necessitating a new trial. Comp. Laws 1913, § 7660. The argument in support of this contention concerns itself with two main propositions: (1) That the evidence is insufficient to establish that the plaintiff suffered a permanent injury; and (2) assuming such permanent injury to have been established, the plaintiff had not sufficient earning capacity to warrant a verdict for the sum given. The proper weighing of this contention has involved a painstaking examination of the record by every member of this court, and has led to the formation of different conclusions therefrom. A statement of the facts

which the record discloses, bearing upon the physical condition of the plaintiff, according to the views of the majority of the court, shows that a question of fact was presented for the consideration of the jury and that their verdict in response to it is one that finds substantial support in the evidence.

At the time the plaintiff received the injury she was twenty-two years of age. She enjoyed good health and was receiving for the work that she had been doing \$25 per month and her room and board. On the day of the accident the plaintiff's brother found her lying at the bottom of the stairway at the rear of the building in an unconscious condition with the bricks from the fallen wall lying upon and about her. She was carried to a room in the building bleeding at the mouth and nose and upon her back there was a bruised area over the spinal column and about the shoulder blades. A doctor was at once called to attend her and up to the day of the trial she had been constantly under the care of this physician. Between the date of the injury and the date of the trial, a period of approximately three years, the plaintiff had been bedfast and in a paralyzed condition which her doctor described as traumatic neurosis. This disease is attributed to the injury in question and the diagnosis of its presence is positive. The defendant, on the other hand, and experts testifying on her behalf, contend that the plaintiff is afflicted with hysteria; that she has no traumatic neurosis and no motor paralysis; that she would be able to move about in a normal way if she willed to do so.

The condition of the plaintiff was presented to the jury by the testimony of six doctors who had observed her, by a nurse, her relatives who had attended her, and by herself, she being present during the trial and giving testimony from a cot upon which she was carried back and forth. The physician who saw her first was Dr. J. W. Vidal, a homeopathic physician who had been graduated from the University of Michigan and who had had thirty-four years of experience. At the time he first saw her, which was about noon on the day of the accident, he says that she apparently could not move any part of her body, and that she apparently did not understand anything he said to her; that she was perfectly placid and couldn't move; that from the date of the accident to the date of the trial he had visited her about two hundred and fifty times; that he was assisted in the treatment by Mrs. Nelson,

a nurse, who had applied hot packs to the spine and massaged her with the hand and a vibrator, followed by alcohol rubs and the use of a chemical light known as "lucrescent" light. In treating her he had observed her inability to move her body to the extent that if, in turning her, her face should be turned directly on to the pillow, she would smother, as she couldn't move from that position to enable her to breathe. But notwithstanding the motor paralysis described by Dr. Vidal, he also testified that, according to his observations, the plaintiff suffered great pain when various portions of her body were touched, as, for instance, when soliciting the patella reflex or in moving the head. He testified that in his opinion the patient was suffering from what he termed spinal neurosis, and that she was permanently injured. The peculiarity of her condition is that the posterior motor nerves are paralyzed, while the sensory nerves are not paralyzed but are exaggerated.

Dr. Francis Peak, a homeopathic physician of thirteen years' experience, testified in detail concerning the examination he made of the patient, and not only confirmed the diagnosis given by Dr. Vidal, but gave a scientific explanation of the possibility of there being a paralysis of the motor nerves without accompanying paralysis of the sensory nerves.

Dr. Olaf Hagen, of Moorhead, Minnesota, a graduate of the University of Minnesota and a practitioner of eleven years' experience, also testified confirming the diagnosis.

Three doctors called by the defendant testified as experts. They were Drs. McGregor, Sorkness, and Wheeler. These men likewise possessed the usual qualifications, and they testified as to their observations from personal examination of the plaintiff, as well as in response to hypothetical questions. The principal point of difference between the opinions of the experts testifying at the instance of the defendant and those testifying for the plaintiff is as to the possibility of there being a condition of paralysis affecting the motor nerves which does not at the same time affect the sensory nerves. Dr. McGregor, for instance, testified that as a general proposition a paralyzed individual cannot experience pain, and that he didn't think that a woman suffering from paralysis as a result of a traumatic injury could be so paralyzed as to lack power of locomotion and yet suffer more or less pain. This opin-

ion is based upon the fact that the nerve fibers in the spinal column are so intermingled that it would be impossible for traumatism to injure the motor nerves without likewise injuring the sensory nerves, and he therefore did not consider it possible for an individual to suffer the pain that the plaintiff claims to have suffered if she was paralyzed to the extent of being unable to move. Other conditions testified to by this witness, upon which he based his opinion that the plaintiff was not paralyzed, were that the patella reflexes were exaggerated, that the muscles of the body had not atrophied, that there were no bed sores on the body, and that the plaintiff's body was apparently well nourished. He also testified that even if a condition existed in which the motor nerves were affected, and not the sensory nerves, it could not exist for any length of time, for either the nerves that were injured would be repaired, or those that were so injured that they could not become normal again would be so completely paralyzed that there would be no sensation, pain, or motion. Dr. Sorkness expressed opinions similar to those of Dr. McGregor, as did also Dr. Wheeler. These doctors agree in the opinion that there is no paralysis of either the motor or the sensory nerves. Dr. Wheeler, however, said that it was possible to have paralysis and pain at the same time. These doctors account for the then condition of the plaintiff as being due to hysteria, neurosis, or self-suggestion, and they regard her contribution to her own condition as being a certain extent unconscious. It is their opinion that such injuries as she sustained were of a temporary character.

Upon this testimony this court is asked to set aside the verdict of the jury on the ground that it lacks the requisite support to justify a finding of permanent injury and damages based thereon. The record impresses us, as the testimony might have impressed the jury, with a degree of uncertainty as to the true condition of the plaintiff, but we are not warranted in disturbing the verdict of the jury on the ground that there is some uncertainty as to the character of the injury. The extent of the injury is a question of fact, and, like other questions of fact, is to be determined by the jury, and not by the court. It is only when the evidence is of such a character that reasonable minds can draw but one conclusion therefrom that the court is justified in pronouncing the conclusion. If the jury believed the witnesses for the plaintiff and if they were so impressed by her demeanor during the

trial as to believe that she was in fact injured as claimed, we cannot say on this record that such is impossible or that the jury should have found otherwise. There being ample evidence upon which to base the verdict, in so far as the verdict may involve a finding of permanent injury, it cannot be disturbed by this court upon appeal. The responsibility for this verdict, under our existing jurisprudence, clearly rests upon the jury and, under our procedure, where no error has been committed warranting a reversal, we know of no method according to which a case of this character may be so tried as to shift the responsibility for the determination of the difficult questions of fact from the shoulders of the jury to those of the judge. The testimony amounts to legal evidence and has apparently been sufficient to carry conviction to the mind of the jury. There is no rule of law that requires testimony in cases of this character to do more than this. Furthermore, the trial judge had the same opportunity to observe the witnesses and to weigh their testimony that the jury had and he was evidently so far impressed with the testimony as a whole to feel justified in exercising his discretion in favor of the plaintiff upon the motion for a new trial.

The peculiarity of this case is only that the facts are difficult to determine. But mere difficulty in determining facts does not give rise to any different procedure or call for the application of any different legal principles than such as apply ordinarily. This is not a case such as *Johnson v. Great Northern R. Co.* 107 Minn. 285, 119 N. W. 1061, where the plaintiff's witnesses acknowledged that they were not experts on nervous conditions, and where the defendant produced experts who were capable of giving and who did give complete scientific explanations of the plaintiff's symptoms, which could lead only to the conclusion that there was no appreciable injury to the nervous system. On the contrary, it is a case where, so far as the record discloses, the experts testifying for both the respective parties were equally qualified to express opinions concerning the plaintiff's condition. Thus, while in view of the possibilities of simulation, policy might dictate a close scrutiny of testimony going to establish permanent nervous disorders, we cannot lose sight of the fact that the law does not purport to determine questions peculiar to physiological science. Neither it is possible to lay down rules according to which injustices due to verdicts of juries on questions of fact can be obviated in all cases. Verdicts which

by subsequent demonstration may be found to be unjust may nevertheless be of unquestionable legal validity. This may work to the disadvantage of either party, for wrongs are perhaps as likely to result from the denial by juries of substantial damages for real injuries as from awards for injuries which prove to be less serious than anticipated. If, for instance, the jury in the instant case had credited the testimony of the experts who testified for the defendant and had rendered its verdict accordingly, there can be no doubt that the plaintiff would not have been entitled to another trial. And her right would be no different, though she should remain for life a helpless paralytic. With the development of medical science it may become possible to set up more satisfactory standards for the diagnosis of nervous disorders, and this may in turn result in preventing imposition upon courts and juries such as occasionally occur; but in the light of present standards and on the record before us the majority of this court is of the opinion that it is not warranted in saying that the jury was imposed upon in the instant case.

We have examined the authorities relied upon by the appellants, in which verdicts for substantial damages were set aside on the ground that the evidence did not show to the requisite degree of certainty that the injuries were permanent. But these authorities are not applicable in the instant case, for if the plaintiff's condition has been properly diagnosed by the experts who testified on her behalf, there can be little doubt of the permanency of the injuries. Such doubt as there is on this point arises from the disagreement of the experts concerning the character of the injury itself, rather than its effects, provided the diagnosis is correct. The witnesses for the plaintiff testify that there is a lesion of the spinal cord or a condition of traumatic neurosis. Those for the defendant say that, in their opinion, such a condition does not exist. For this court to say, then, that the plaintiff has not sustained the burden of proof as to the permanency of her injuries would involve the usurpation of the functions of the jury in weighing testimony upon a disputed fact relating to an existing condition. *Dickinson v. McBride*, 127 Ark. 555, 193 S. W. 89; *St. Louis & S. W. R. Co. v. Hemmert*, 118 Ark. 601, 174 S. W. 222; *Callicotte v. Chicago, R. I. & P. R. Co.* 274 Mo. 689, 204 S. W. 529.

It has been suggested that such damages as were allowed in the in-

stant case to compensate for permanent injuries are not sufficiently certain within the rule laid down in § 7141, Comp. Laws 1913. This section reads: "Damages may be awarded in a judicial proceeding for detriment resulting after the commencement thereof, or certain to result in the future." The contention is that prospective damages recoverable can only be such as are in reality certain to result and not merely such as may be likely to result in the future. In *York v. General Utilities Corp.* 41 N. D. 137, 170 N. W. 312, this court reversed a judgment for error in instructions, where the trial court had instructed the jury that in estimating damages they might consider the "likelihood" of the injuries being permanent and the pain the plaintiff had suffered or "may be likely to suffer in the future." This instruction was regarded as too favorable for the plaintiff, particularly in view of the fact that the court refused the defendant's request to so limit the comparative terms "likelihood" and "likely" as to make clear to the jury that speculation and conjecture were not to be indulged in. We are of the opinion that the word "certain" appearing in the statute is not used in the absolute sense. It relates to the future, and therefore cannot be construed as only embracing those consequences or elements of damages which are absolutely certain to follow a given injury, for future happenings are necessarily somewhat uncertain. The section had its origin in the original Field Code, § 1467, Draft of Civil Code for the State of New York (1862) and the commissioners contented themselves with citations to *Sedgwick on Damages*, 104, and *Wilcox v. Plummer*, 4 Pet. 172, 182, 7 L. ed. 821, 824. Reference to these authorities discloses that the rule of damages codified by the section in question is the rule according to which all damages for a given injury must be recovered in one suit, which requires, according to the rule stated by *Sedgwick*, § 86, that the recovery shall embrace not only compensation for loss already sustained "but also for such loss as he (the plaintiff) can with *reasonable* certainty show will accrue in future." *Sedgwick* further points out that a contrary rule had formerly existed in England under which damages were allowed only to the time of the commencement of the action. *Comyns's Dig. Damages, D*; *Pilfold's Case*, 10 Coke, 115b, 77 Eng. Reprint, 1102. The clear purpose of the statute, then, was to alter this rule, and enable a plaintiff to recover damages which are reasonably certain to accrue in the future.

If more were required than reasonable certainty it can readily be seen that all recovery of prospective damages would be precluded in actions for personal injuries where the injuries have resulted in nervous disorder. For, under the present state of medical science, even the most learned and highly specialized experts do not venture to say that they can assuredly foretell the probability of recovery. The adjudicated cases, fully sustain the proposition that recovery may be had as for permanent injury in cases of traumatic neurosis, even though there may be some likelihood of recovery. *St. Louis & S. W. R. Co. v. Hemmert*, 118 Ark. 601, 174 S. W. 222; *Louisville & S. R. Co. v. Minogue*, 90 Ky. 369, 29 Am. St. Rep. 378, 14 S. W. 357; *Dickinson v. McBride*, *supra*; *Callucotte v. Chicago, R. I. & P. R. Co.* *supra*.

In fact, the rule seems to be well established that courts are somewhat more reluctant in cases of this character to disturb the verdicts of juries than in cases where they can more readily weigh and determine the elements having a legitimate bearing in estimating damages.

Says Cyc. (13 Cyc. 129-132):

"In cases of paralysis or injury to the nervous system a verdict will rarely be considered excessive. So in injuries to the spine that have resulted from a personal injury, the court is little inclined to interfere with a verdict on the ground that it is excessive.

"Where it appears from the evidence that the injury complained of has proved or is liable to prove permanent, the appellate courts are little inclined to interfere on the ground of excessive damages. Indeed the courts have gone so far as to refuse interference on the ground of excessive damages not only where there is a probability of permanent injury, but where the evidence shows that a possibility exists. Even where the evidence is conflicting as to the permanency of the injury or where the recovery is doubtful the courts will not set aside a verdict of excessive." See also 17 C. J. 1087, § 397.

Under the evidence in this case pain and suffering, both past and prospective, were also proper elements of damage. 8 R. C. L. 544. Without expressing an opinion as to the degree of certainty of permanent injuries required to support a verdict, we are of the opinion that there is substantial evidence in this case to support the verdict of the jury in its entirety and that the case falls well within the principles supported by the authorities above referred to.

As to the contention that the verdict is excessive, viewed from the standpoint of compensation for pain and suffering, and for the loss of earning capacity upon the supposition that permanent injury has been sustained, we think little need be said. At the time this case was tried the plaintiff had undergone approximately three years of pain and suffering; had incurred considerable expense in connection with her care, and there was a strong probability that her condition would remain practically the same for the remainder of her life. She would not only be unable to earn a livelihood, but she would require the services of others to minister to her wants. This contention is therefore regarded as being without merit.

The appellant also contends that in any event no actionable negligence has been shown, and in this connection reliance is had upon the general doctrine that a landlord is not liable to those who sustain injuries caused by defects in leased premises. The provisions of the lease are pleaded. According to the lease, the lessee was to perform all labor necessary to do the carpenter work, painting, paperhanging, etc., and the lessor was to furnish the materials. In case of the failure of the lessor to furnish the materials, consisting of lumber, wallpaper, paint and glass, and other materials necessary to place the building in a first class and sanitary condition, the lessee was authorized to procure the same at the expense of the lessor. It does not appear that repairs of the character required to render the exterior veneered brick wall safe were contemplated by the parties to the lease nor embraced within their contract, but on the contrary it rather appears that the lessor assumed any obligation there might be with respect to such repairs; for it was expressly agreed that any repairs that might be required on the roof should be done by her.

The rule for which the appellant contends, according to which the landlord is held not liable to employees of the tenant, is generally applied in instances where the injury was occasioned by a defect in the premises which, as between the landlord and the tenant, the landlord was not bound to repair. It is, of course, competent for a landlord and a tenant to contract for the rental of premises in their existing condition and for the tenant to assume the burden of rendering them safe and habitable. Under such an arrangement those who may come upon the premises during the lease would be there at the tenant's in-

vation, so that any resulting injury would be attributable to his fault and would not involve any breach of duty owing by the landlord. *Daley v. Towne*, 127 Minn. 231, 149 N. W. 368; *Bailey v. Kelly*, 93 Kan. 723, L.R.A.1916D, 1220, 145 Pac. 556. That is not so in this case, however, as the tenant did not assume an obligation to make the repairs in question, and the defendant leased the premises knowing full well that their use would require the presence of persons who would have occasion to use the rear stairway as the plaintiff in this case was using it, and who would thereby be subject to the hazard of the defective condition of the veneered wall. It appears as a fact that the wall in question had been condemned by the city authorities as unsafe, and that the defendant had full knowledge thereof. But it is not shown that the plaintiff knew of the defective condition, nor can we assume that the condition was so obvious that it must have been known to one having no particular occasion to observe it and no skill in detecting such defects. See *Russell v. Fargo*, 28 N. D. 300, 148 N. W. 610; note in 50 L.R.A.(N.S.) 286.

It is also argued that the defendant was prejudiced by being denied the right to impeach the plaintiff, her mother, her sister and her brother. To impeach these witnesses, defendant's counsel sought to show upon the cross-examination of the plaintiff's brother that the plaintiff, her mother and her sister gave certain testimony in a bankruptcy proceeding in the Federal court, pursuant to a voluntary petition of the plaintiff's brother-in-law, Papamanoles, and in a trustee's action set aside certain conveyances and mortgages executed by the bankrupt, which testimony was so incredible that it was not believed by the Federal judge who found as a fact that the parties referred to had committed perjury. The discredited testimony was designed to establish the bona fides of the transaction attacked by showing that the plaintiff's mother had accumulated several thousand dollars in currency which she kept in a box hidden in the cellar of her residence in Minnesota, and that this represented earnings of her sons, including the witness, which had been sent to her from time to time. In the offer it was stated that this case was begun shortly after the rendition of the adverse decree in the bankruptcy and trustee proceedings and the offer was made with reference to each witness and for the purpose of affecting the credibility of the plaintiff and her family.

This evidence was objected to on every ground that could affect its admissibility. Conceding that this case is one in which the broadest latitude should be given in the cross-examination of plaintiff's witnesses, we cannot view the exclusion of the evidence referred to as involving reversible error. In this jurisdiction the most liberal rules obtain for testing the credibility of witnesses on cross-examination. *Territory v. O'Hare*, 1 N. D. 30, 44 N. W. 1003; *State v. Kent* (*State v. Pancoast*) 5 N. D. 516, 35 L.R.A. 518, 67 N. W. 1052; *State v. Malmberg*, 14 N. D. 523, 105 N. W. 614. It is even held, as will be seen in *State v. Malmberg*, *supra*, that facts which affect the credibility of a witness' testimony in the specific case, as distinguished from facts affecting credibility generally, may be shown by independent evidence. It is also true that, generally, greater latitude should be permitted in testing credibility on cross-examination than in allowing independent evidence for this purpose (see 2 Wigmore, Evidence, § 954), and that the range of cross-examination is largely within the discretion of the trial court. Inquiry, however, as to specific acts indicating corruption should not be indulged in unless the facts inquired for have a direct bearing upon the credibility of the witness for the case in hand. As was held, for instance, in *South Bend v. Hardy*, 98 Ind. 577, 49 Am. Rep. 792, the plaintiff, who had testified in support of his own claim for personal injuries against a city, could not be cross-examined upon a prior attempt to defraud an insurance company by causing a false death claim to be presented; and in *Elliott v. Boyles*, 31 Pa. 65, that a witness could not be asked in cross-examination whether on another trial he had committed perjury. See also, *Third Great Western Turnp. R. Co. v. Loomis*, 32 N. Y. 127, 88 Am. Dec. 311; *Penny v. Rochester R. Co.* 7 App. Div. 595, 40 N. Y. Supp. 172, 178; *Com. v. Mason*, 105 Mass. 163, 7 Am. Rep. 507; 5 Jones. Ev. § 832. But where the evidence tends directly to affect the credibility of the witness in the particular cause it would be error to exclude it. See *Finlen v. Heinze*, 32 Mont. 354, 80 Pac. 918, where it was held error to exclude evidence tending to impeach a witness by showing that he had been an active agent in corrupting a judge on a former trial of the same case. In *Beck v. Hood*, 185 Pa. 32, 39 Atl. 842, where it was held proper to impeach credibility on cross-examination by showing that on a former trial of the same case the witness sought to affect the verdict by making

statements to a juror out of court. In the instant case the questions were not so framed as to admit of answers affecting credibility generally and we are of the opinion that the connection between the supposed corruption involved in the bankruptcy proceedings and that in the instant case is not sufficiently apparent to warrant us in holding that the limitation of the cross-examination in the manner indicated was an abuse of discretion amounting to error.

Error is also predicated upon a ruling of the trial court sustaining an objection to the following question asked Dr. Vidal upon cross-examination: "Has it been your experience, Doctor, in many of these cases, that if there was a verdict for the plaintiff, the party recovered and would walk?" While, in our opinion, it was proper to thus seek to test the value of the doctor's opinion, we do not regard the error as being at all serious, for the reason that ample opportunity seems to have been afforded for cross-examining the doctor as an expert and the jury was as fully enlightened upon the characteristics of neurosis as the combined evidence of the six doctors could make them.

Every feature of this case has received the most careful attention of the court, those features upon which we have entertained any doubt having been reargued at the direction of the court. We fully appreciate the possibility of injustice being done in cases of this character, but after the most painstaking consideration it appears to the majority of the court that a fair trial has been had, and a record made which presents no error warranting a reversal.

The judgment and order appealed from are affirmed.

CHRISTIANSON, Ch. J., concurs.

GRACE, J. I concur in the result.

BRONSON, J. I dissent. This case was argued and submitted before this court on December 23, 1918. It was again reargued before this court on November 17, 1919. The case is now (December 2, 1919), about to go down affirmed under the majority decision. I adhere to my conclusions, stated in an opinion circulated by me in the month of February, 1919. If the plaintiff has been injured to the extent of the verdict rendered, which the majority opinion sustains, and which in my opinion the evidence does not warrant, this action should long

ago have been determined as a matter of simple justice to the plaintiff. I am firmly of the opinion that a new trial should be awarded this case, conditioned upon the payment into court of an amount of money, for the use and benefit of the plaintiff, necessary to cover costs, expenses, and for an opportunity to establish her true physical condition before a jury. My conclusions upon the record herein, are as hereinafter stated:

This is an action for personal injuries, sustained by the plaintiff on February 3, 1915. At the time she was working as a servant or domestic in an old brick veneered building known as the Ely Block, and Annex, owned by the defendant in the city of Fargo. While proceeding down the back stairs to the basement of such building to attend the furnace, a portion of the rear brick wall fell, some of the brick hitting the plaintiff. She was knocked down, and the alleged injuries sustained thereby form the basis of this action.

In the district court trial was had, commencing January 24, 1918, and ending February 1, 1918. The jury rendered a verdict for the plaintiff of \$26,000. After judgment was entered, the defendant moved for judgment non obstante, or in the alternative, for a new trial, and from the order of the trial court denying the same, and from the judgment rendered, defendant prosecutes this appeal.

The record herein is extensive and the briefs of the parties voluminous. The defendant has assigned nearly one hundred errors, covering the rulings of the trial court upon the admission of evidence, remarks of the court and of counsel, instructions of the court, and covering other alleged errors of law occurring during the course of the trial, and upon the motions made by the appellant thereafter.

The record has been investigated with considerable care with respect to the many assignments of error that have been specified by the appellant.

In view of the determination of the principal questions considered herein, I deem it unnecessary to consider the numerous assignments of error in detail, except as hereinafter stated concerning the principal question in this case which has seriously engaged our attention. Upon the entire record herein I am satisfied that the jury were warranted in finding the defendant guilty of actionable negligence for such injuries as the plaintiff has actually sustained.

The principal question, therefore, is the amount of the verdict rendered. The appellant challenges the same upon the ground that it is manifest that excessive damages have been given by the jury under the influence of passion or prejudice, and that, upon the whole record herein, the evidence does not justify the same as rendered.

In many respects this is an unusual case. At the time of the injury the plaintiff was twenty-two years of age; until she was sixteen years of age she had worked on a farm with her mother; she had reached the eighth grade in school; thereafter she came to Fargo and worked out as a domestic for several years. For nearly a year prior to the accident, she was working for her mother in this block taking care of rooms and of the furnace and receiving therefor \$25 per month and her room and board. Theretofore she has been strong and healthy. The defendant on April 3, 1913, leased for eight years the second floor of this Ely Block to one James Papas or James Papamanoles, a Greek. This Greek some years previous had married the sister of the plaintiff. Since the leasing and up to the time of the trial this Papas and his wife had occupied a room in this block. On June 24, 1913, this Papas assigned to his mother-in-law, the mother of the plaintiff, this lease, and thereafter the mother had charge of the premises. There is evidence in the record that this building with reference to the brick wall which fell had been in an unsafe condition for a time extending back long before the making of the lease. That on the day of the accident the plaintiff was found at the bottom of the stairway with brick from this brick wall upon and about her; that she was picked up and carried to a room in this building; that she was unconscious, and bleeding at the mouth and nose; that across her back there appeared a contused bruised area extending from the upper surface of her shoulder blades 5 or 6 inches down the spinal column, and from the right shoulder down on the right arm nearly to the elbow. The skin was broken in places with a slight hemorrhage. There were no broken bones. There she was put to bed, there a doctor was called in and attended her, and there she has ever since remained in bed in this block.

There is evidence in the record that for nearly three years up to the time of the trial the plaintiff has been paralyzed; the doctors, the experts for the plaintiff, diagnose her condition as "traumatic neurosis" or "traumatic paralysis," an affection of the motor nerves with ac-

companied hysteria, an accompanying exaggeration of the sensory nervous system. She has received the care and attention of her relatives, particularly her sister and her mother. She has been attended by a doctor, an expert witness for the plaintiff, a homeopathic physician, who has attended her, at first daily, then thrice a week, thence twice, and thence once per week, and who has prescribed for her in accordance with the principles of homeopathy. She has been attended by a nurse, an assistant in the Nelson Sanatorium, since March 23, 1915, who came there at first thrice a week, thence twice a week, and later once per week. This nurse administered massage and electric treatments with her hands, an electric vibrator, and the so-termed "lucre-descent" light treatment.

The evidence adduced by the plaintiff shows her condition to be peculiar. Since the time of the accident she has been unable to move any portion of her body, excepting that she has regained a partial use of her left hand and left forearm. During all of this time she has been extremely sensitive; whenever her body is moved, her arms or limbs raised, her neck raised or turned, her feet pricked slightly or touched with a pin she will shriek, cry, or give exclamations of pain; whenever the nurse would start to manipulate or move any part of her body, her arms or her limbs to apply the treatment, she would cry out and give evidence of extreme pain.

Six doctors, as experts, gave testimony; three for the plaintiff and three for the defendant. The plaintiff called the homeopathic physician who attended her; also another homeopathic physician, of twenty-three years' experience, who saw the plaintiff four or five times within two weeks before he testified, and who examined her twice within that time; also another physician, engaged in the practice of medicine and surgery for some eleven years, who examined the plaintiff once in the presence of two homeopathic physicians. The defendant called a physician and surgeon of twenty years' experience as a general practitioner, who examined the plaintiff twice, once in May, 1917, and again during the course of the trial; also another physician, apparently a general practitioner whose qualifications are conceded by the plaintiff, who likewise examined the plaintiff twice, once in May, 1917, and again during the course of the trial; also another physician and surgeon, a general practitioner of forty-one years' experience, who examined the plaintiff during the course of the trial.

Outside of the physical surrounding circumstances evidencing over a considerable period of time the disability of the plaintiff, the question of whether the plaintiff is permanently injured depends entirely upon the expert evidence or the opinion evidence of these doctors. All of the doctors generally agree that the body of the plaintiff is fairly well nourished, her heart, lungs, and other internal organs are practically normal, and that generally speaking there is no lack of functioning except with respect to the motor nervous system and the exaggerated functioning of the sensory nervous system. One of the experts for the plaintiff testified that although there is no apparent injury to the spinal cord, yet he thinks there is a lesion of the spinal cord; another of the experts for the plaintiff gave testimony that the reflexes of the plaintiff are delayed; that when the body of the plaintiff is turned over her arms or limbs fall and place themselves without evidence of muscular control. Another expert for the plaintiff testified that the sympathetic nervous system is healthy, but the motor nervous system is not. Generally the experts for the plaintiff state that there is a paralyzation existing of the motor nerves, and that in their opinion the plaintiff is permanently injured. The general practitioner, the expert for the plaintiff, testified that his examination of the plaintiff disclosed that the body of the plaintiff was fairly well nourished, that the lungs, heart, liver, kidneys, intestines, and female organs were normal. This doctor gave his opinion that the plaintiff was permanently injured; that the condition was what he termed symptom complex, because it involved certain physical changes; that there was here a "traumatic neurosis" due to a spinal injury and the hysterical element, the traumatic element due to the physical and mental suffering resulting from the original injury; that there was an abnormality found in the muscles that control motion, likewise in the muscles that control sensation; that there was an abnormality in the sympathetic nervous system, which does not react in a normal way on the nerve seats. He further testified that the right arm reflex responded immediately to the blow with pain—that is, it was delayed; that the left arm reflex was not so pronounced, with no particular pain; that the knee reflexes were much increased over the normal; that the plantar reflex gave no response. The doctor further admitted, with reference to the hysteria and pain evidenced, that simulation, under the circumstances, was possible.

The experts for the defendant generally agreed that the plaintiff is well fleshed and well nourished; that her skin is of a proper color; that there is no nutrition disturbance; that there is no indication of injury to the spinal cord; that her heart, lungs and other bodily functions are normal. One testified that the reflexes were normal; another testified that the knee reflexes were normal, but the foot or plantar reflex was not. That if there existed in fact a motor paralysis there would be a nutrition disturbance, a disturbance of the bladder; that bed sores would inevitably appear. All of the experts agree that the plaintiff did not have any bed sores. All of the defendant's experts agree that the plaintiff in their opinion can walk; that she can use her right arm; that she is not permanently injured; that she will recover; that the hysteria evidenced is peculiarly subject to auto suggestion and the suggestions arising from her surroundings. One of these experts further testified that if the plaintiff were put in a sanatorium, he would expect a rapid recovery; that she ought to be entirely well in six months.

The plaintiff was brought into court upon a cot. From this cot she gave her testimony, interrupted with frequent outcries of pain and suffering. Frequently she was taken from the court room during the course of her examination, crying and with evident hysteria. The defendant subjected her to a long and severe cross-examination covering forty-nine pages in the transcript. When her arm or any portion of her body, except her left fore arm and hand, were touched or handled in the court room she screamed and gave evidence of great suffering; when her head was raised to give her some water she screamed out with pain. The severe cross-examination, at least, served to exaggerate her condition and her hysteria. The demonstration visualized before the jury cannot be overlooked. This demonstration in open court naturally appealed most forcibly to the tender sympathies of the jury. It might very naturally cause them to be biased and prejudiced in the consideration of the permanency of the plaintiff's injuries, when the extreme physical suffering of the plaintiff in their very presence is actually seen and visualized, as opposed to the impassionate testimony of the experts and other witnesses. The defendant introduced testimony of some witnesses tending to show that the plaintiff was not injured by the fall of the brick wall, for the reason that she was not

there at the time. The defendant also introduced the testimony of some witnesses, among them two detectives, tending to show that the plaintiff at one time was up in her room dusting her mattress and moving about the room; that at another time she was seen in the hall going to the toilet; that at other times she was moving about her room, and at another time she was operating a music box or phonograph when no one else but herself could be there.

The defendant contends that this action is a case of simulation; that the plaintiff was seclusively kept and watched, and no one allowed to see her except her immediate attendants and relatives, who have testified for her favorably in this case.

This matter, however, upon the record is one of fact for the jury, but it nevertheless has its importance in determining the vital question in this case concerning the permanency of the plaintiff's injuries. In this connection it is particularly noticeable that this condition of the plaintiff, termed to be a traumatic neurosis, a motor paralysis, importing a condition of lesion of the spinal cord, as claimed by some of plaintiff's experts, has received the attention of medical science and medical research only to the extent of applying homeopathic principles and doctrines, and of massage and electrical treatments by a nurse.

Cases of this kind are *sui generis*; whether under such state of facts, the injuries are permanent is a matter of speculation, under all medical authorities and in accordance with the researches of medical science. The "simulation" mentioned may be actual, that is pretended, or unconscious, that is real. In cases of this character the hysterical element, the evident pain and suffering, may be partially at least, due to the litigation, to introspection, or auto suggestion, even to suggestion from without. Whether such simulation is evidence of permanent injuries is quite problematical. If there be a traumatic lesion in fact, the condition may and possibly will remain permanent. Whether there is such a traumatic lesion here none of the experts know. The question whether she is permanently injured rests entirely upon the opinion of experts. Even this opinion evidence is not backed up by the application of all the means at hand of medical science and appliances which might serve to determine or conclude the question.

In order to sustain the verdict in this case awarded for this large sum of money, it must fairly appear that there is evidence in the rec-

ord warranting the finding of the jury that the plaintiff was injured permanently in the respect that she testified, and as her apparent condition revealed to the jury at the time of the trial.

Manifestly, if the plaintiff would recover wholly or to a considerable degree, by the application of the best medical science and medical research, within a period of six months, or even two or three years, the verdict is excessive.

There is no evidence in the record to show that the plaintiff has received all the treatment and the best attention that medical science and medical research in this sort of an injury affords. There is evidence in the record, an expert opinion, that if the plaintiff be placed in a sanatorium, and taken from her surroundings, a rapid recovery should occur.

This court cannot speculate concerning the permanency of plaintiff's injuries; neither can the jury. In cases of this kind it is the duty of the court to exercise the utmost circumspection. *Johnson v. Great Northern R. Co.* 107 Minn. 285, 119 N. W. 1061. The future continued existence of plaintiff's present condition, throughout her lifetime, must be shown with reasonable certainty to authorize damages based upon a finding that her condition is permanent. The permanency of plaintiff's injuries depends upon expert opinion evidence; although given by experts, it nevertheless consists of mere opinions, creditable, more or less, in accordance with the experts' information upon the subject-matter involved. The opinion evidence in this case is in direct conflict concerning the permanency of plaintiff's injuries. This court does not presume to weigh testimony; a conflict of opinion evidence is viewed in a different light; it differs from testimony dealing with facts. In ascertaining whether there is proof to a reasonable degree of certainty establishing the permanency of plaintiff's injuries, it is the right, and even the duty, of this court to consider such opinion evidence at its true and proper value. *Waterman v. Minneapolis, St. P. & S. Ste. M. R. Co.* 26 N. D. 548, 145 N. W. 19.

Very often such opinion evidence of experts is unreliable not only on account of the method of selecting experts, which serves to induce bias, but also for the reason that, in cases of this character, the expert, although learned and experienced, may not have had direct, or even any, experience, in the consideration thereof. In such cases such opin-

ion evidence may be even rejected as an insufficient basis for the verdict of the jury where the court is satisfied that reasonable certainty is outside of the possibilities of the case upon the record. *Spear v. Hiles*, 67 Wis. 361, 30 N. W. 511; *Johnson v. Great Northern R. Co.* 107 Minn. 285, 119 N. W. 1061; *Baxter v. Chicago & N. W. R. Co.* 104 Wis. 307, 330, 80 N. W. 644, 6 Am. Neg. Rep. 746.

The evidence, at best, shows the condition of the plaintiff to be functional; subjective, not organic. Whether there is a traumatic lesion of the spinal cord is wholly problematical. Upon this subjective condition, with no direct or positive evidence of organic trouble, a condition which under the medical authorities is subject to suggestion, either within or without, a condition from which recoveries are known, the opinion evidence of permanent injury is founded. *Osler, Practice of Medicine*, 7th ed. 433; *Bucher v. Wisconsin C. R. Co.* 139 Wis. 597, 120 N. W. 518.

This court must carefully protect the right of the jury to pass upon all true questions of fact submitted to it. This court must likewise guard against any miscarriage of justice. More and more litigants, seeking justice, must submit and be required to submit all probative facts which will enable courts of justice to render and administer impartial justice. This cannot be secured when based on speculation and conjecture. Both the jury and the court are entitled to have submitted to them all evidence within the reach of the parties or the court that will tend to remove questions of doubt and uncertainty.

With great reluctance this court deems it necessary to disturb the verdict rendered herein. The plaintiff has been seriously injured; she has suffered greatly, but it is altogether uncertain whether her injuries are permanent. The manner in which the plaintiff was cared for, the place where she was kept, the unusual physiological condition of her body, the amount of the claim that she made against the city within about thirty days from the time of the accident, the opportunities for simulation in a case of this character, the visual demonstration made before the jury, are all strong corroborative circumstances which serve to throw doubt and uncertainty upon the expert opinion evidence of the plaintiff upon which solely the amount of the verdict rendered herein can be sustained. Although there is evidence which shows that for three years the plaintiff has remained in this condition, yet during that

time she has received the application of medical science only through principles of homeopathy and massage. It is not in evidence that this is the only exclusive treatment which will accomplish a recovery in this case or cases of this character. It simply serves to render more speculative the opinion evidence of the plaintiff.

The interests of substantial justice require that the jurisdiction of this court and of the trial court be exercised to the end that it may be ascertained as far as medical science and the surrounding circumstances will permit, the extent and permanency of plaintiff's injuries. If the courts do not possess this power, the power to ascertain the facts as certainly as possible, and to call in science for that purpose, with the consent of the parties, then the courts must confess the right to speculate and conjecture upon facts, based upon conjecture and speculation, which otherwise might be made more definite and certain.

The courts in this state possess an equitable discretionary power in the granting of new trials; this power may extend to the imposition of reasonable terms upon the moving party when justice so requires.

Under our statute (Comp. Laws 1913, § 7844) this court has the undoubted authority to reverse or modify the judgment or order herein. Ordinarily the granting of a new trial upon grounds of the insufficiency of the evidence to justify the verdict is within the discretion of the court. This discretion may properly be exercised by granting a new trial only upon equitable terms. The appellant seeking redress against an improper verdict, and not herself wholly free from fault in the record that produced such verdict, must subject herself to the equitable power of this court. This principle is familiarly applied in the imposition of costs or of the entire costs of a previous trial, upon the appellant, conditioned upon the right to a new trial. *Swallow v. First State Bank*, 35 N. D. 323, 328, 160 N. W. 137; *Corbett v. Great Northern R. Co.* 28 N. D. 136, 150, 148 N. W. 4; *Rice v. Gashirie*, 13 Cal. 53; *Wolfe v. Ridley*, 17 Idaho, 173, 104 Pac. 1014. See note in 20 Ann. Cas. 39; *Godfrey v. Godfrey*, 127 Wis. 47, 106 N. W. 814, 7 Ann. Cas. 176; 1 Hayne, New Tr. & App. p. 865, vol. 2, p. 1694; *Baylies*, New Trial, p. 546; *Elliott*, App. Proc. § 570.

Thus in the case of *Brooks v. San Francisco & N. P. R. Co.* 110 Cal. 173, 42 Pac. 570, where plaintiff recovered a verdict for \$5,000 for personal injuries, and upon motion for new trial the trial court granted

the same, conditioned upon the payment of \$300 attorneys' fees and expenses incurred in the motion, the court upheld the principle that a new trial may be awarded where the evidence is insufficient to support the verdict, conditioned upon compliance with equitable terms imposed.

In this state it is true that this court has held that a new trial must be granted absolutely, and there is no power to authorize a remittitur of a portion of the damages awarded, where the same are excessive through the influence of bias or prejudice upon the jury, construing § 7660, Comp. Laws 1913, subd. 5.

Carpenter v. Dickey, 26 N. D. 176, 143 N. W. 964; *Waterman v. Minneapolis, St. P. & S. Ste. M. R. Co.* 26 N. D. 540, 145 N. W. 19.

However, in the latter case, *supra*, the court said: "In cases of excessive damages not given under the influence of passion and prejudice, it may be that the trial court possesses the inherent power, regardless of the statute, to grant a conditional order for a new trial in the event that the plaintiff will not voluntarily remit a designated portion from the recovery."

These cases, however, are clearly distinguishable from the situation existing in the instant case. In those cases the principle involved is the finding of the court of an existing bias or prejudice that created the excessive verdict. There is an evident reason in such cases why the court should not substitute its judgment for that which would have been the judgment of the jury if they had acted without prejudice and bias.

In this case the principle involved is the right of the trial court, and of this court acting within its appellate jurisdiction, to exercise its equitable discretion in granting a new trial as a matter of favor, where it appears that the judgment as rendered is not justified by the evidence as to the amount thereof.

Where a verdict or finding of the court is excessive upon the evidence, this court does have the power to authorize a remittitur of the excess. *Aronson v. Oppegard*, 16 N. D. 595, 114 N. W. 377; *Ross v. Robertson*, 12 N. D. 27, 94 N. W. 765; *Lohr v. Honsinger*, 20 N. D. 500, 128 N. W. 1035; *Galvin v. Tibbs*, 17 N. D. 600, 119 N. W. 39.

Among the numerous assignments of error stated by the appellant it is complained that the trial court erred in sustaining the objection of the plaintiff to the following question propounded by defendant to Dr.

Vidal: Q. Has it been your experience, Doctor, in many of these cases that if there was a verdict for the plaintiff the party recovered and would walk?

The plaintiff asserts that Dr. Vidal did not testify as an expert, but as the attendant physician who knew plaintiff's condition. He did, however, give opinion evidence. In view of the order of this court, it is deemed proper to pass upon this assignment: It has happened in cases of similar alleged and proven condition that recovery follows a settlement or disposition of an action maintained therefor. Osler, *Practice of Medicine*, 7th ed. 433; *Robinson v. Spokane Traction Co.* 47 Wash. 303, 91 Pac. 473. The plaintiff asserts that this was an attempt to insert a collateral issue. The question does not disclose any such intention. It was wholly proper to fully cross-examine the doctor upon the opinion that he had given concerning the permanency or extent of plaintiff's injuries. This opinion was necessarily based upon the experience, observation, and learning of the doctor. If his experience and learning disclosed that in cases of traumatic neurosis or paralysis a rapid recovery was had when the lawsuit therefor was settled or determined, such fact was of direct and probative value in determining the weight to be accorded to his opinion upon the instant case. The trial court therefore erred in sustaining such objection.

This, though, by itself, not deemed prejudicial error, simply discloses another corroborative circumstance that heightens the uncertainty of plaintiff's permanent injuries. We are satisfied from the record that the jury was warranted in finding that the defendant was liable for the injuries sustained by the plaintiff and that the plaintiff was injured. I am satisfied from the entire testimony herein that it is not reasonably certain that plaintiff's apparent disabilities are permanent. I deem it unnecessary to determine that the damages awarded are excessive through the influence of passion or prejudice of the jury, although there are strong circumstances tending to so indicate. I am of the opinion that the evidence herein upon the whole record is insufficient to justify the amount of the verdict rendered for the reason that the permanency of plaintiff's injuries is not proven to be reasonably certain. I am also of the opinion that the court possesses the inherent power, when occasion requires in the interest of substantial and impartial justice, to grant a conditional order for a new trial based upon the

good faith of the litigants in earnestly endeavoring to assist the court in determining the extent of plaintiff's permanent injuries.

The defendant, found by the jury legally liable for plaintiff's injuries, and complaining of the verdict rendered, must show a willingness to assist the court in this matter. The plaintiff seeking only impartial justice and reparation in money for her damages sustained, should likewise exhibit a willingness to assist.

ROBINSON, J. The plaintiff is known to the court as The Sleeping Beauty. She is an ideal of physical perfection, and yet she claims that for three years she has been reposing continuously on her bed. Her mother is the holder of a rooming house tenement on Broadway, in the city of Fargo. She holds it as the assignee of a lease made by the defendant to Papamanoles. The lease was made in April, 1913. Two months afterwards it was assigned to the mother. Then, towards the last days of February, 1915, and nearly two years afterwards, during a violent storm, the plaintiff had the misfortune and imprudence to go down the back stairway when some of the brick veneering fell on her shoulders, to her great injury. Her claim is that she has been permanently injured and paralyzed so that she will be always confined to her bed.

It appears beyond dispute the falling brick contused the flesh on her shoulders, but did not cut or break the skin or in any way mar her personal appearance. At the trial her body showed no signs of bed sores, though she claimed to have been continuously in bed for three years. The doctors examined her head, eyes, mouth, tongue, teeth and found everything normal. She is a well-built young woman; her arms, legs and body are normal and well nourished; her digestion is good; her weight is normal; her muscles are natural and not shrunken. From the crown of her head to the soles of her feet she has not on her body a scar, a blemish, or a defect. Hence we call her The Sleeping Beauty.

The appeal is from a verdict and judgment for \$26,000. The trial was conducted in a manner decidedly improper. As in a theatrical play, the plaintiff was brought into court on a cot and by her tears, screams, and appealing looks, she impressed the jurors—won their pity and commiseration. Then, it appears that counsel in his zeal for defendant forgot all prudence, and cross-examined the plaintiff and gave her an excuse for tears, and angered the jury. And the plaintiff

was shrewd and perceptive; she knew when to weep, when to scream, when to remember, and when to forget. The appeal was to the pity and commiseration of the jury, rather than to their deliberate judgment. If the plaintiff was in a helpless condition her testimony should have been taken by deposition and the court should not have permitted any theatrical play. The verdict must be largely for future damages and to give the jury some basis for guessing at such damages proof was given that plaintiff was only twenty-two years old; that she had a fair prospect of forty years in bed, with the expense of attending physicians and nursing, and the loss of her earning capacity. Her three physicians testified that in their opinion her injury was permanent. Three other physicians testified that in their opinion she was merely shamming and that she could walk if she wanted to. To give weight to this testimony, it was shown that plaintiff had been kept in seclusion in the building in which she was injured and she had been kept from general observation, and not in a hospital or sanitarium. Of course such treatment and such seclusion lend color to the charge that she was acting a part and to a great extent shamming. Hence defendant offers to pay such sum of money as may be necessary to give the plaintiff the best of care and medical treatment and attendance at the best sanitariums and hospitals, and to pay her, or to the clerk for her use, such sum as the court may think just and reasonable, or about \$700 a month for six months. But to that offer counsel for plaintiff do strenuously object. By right or wrong, they have obtained a verdict and by *fas* or *nefas* they purpose to hold onto it. In argument counsel have shown that in cases like this such verdicts are often obtained by fraud and imposition on courts and jurors, and that after payment of the judgment the plaintiff quickly recovers from the alleged personal injury. In this case if the plaintiff recover \$13,000, and her counsel \$13,000, I think that within a year the Sleeping Beauty would be perfectly cured and the judges would have reason to feel like dolts. Certainly the verdict is so grossly excessive as to show that the jurors were affected by the theatrical acting and by the tears of The Sleeping Beauty.

And so far as the verdict relates to future damages, it is a mere guess, contrary to the express words of the statute. The statute is that in the trial of such a suit "damages must be awarded for such injuries

as have resulted or are certain to result." Comp. Laws, § 7141. Now the plain words "*certain to result*" do not mean anything less than *certain to result*. In the York Case, 41 N. D. 137, 171 N. W. 312, the court instructed the jury thus: "In passing on the damages you may consider the injury plaintiff received or the likelihood of such injury being permanent." We held the instruction to be directly contrary to the statute which limits damages to those *certain to result* in the future. But here it is contended that in the statute the word "*certain*" is not used in the absolute sense; that it means only such damages as are *reasonably certain* to accrue in the future; that in a case such as this recovery of prospective damages would be precluded if the statute required more than reasonable certainty. Now, that may be good argument to address to the legislature on a bill to change the statute; but it is no reason for the court to modify the statute by inserting the adverb "*reasonably*" before the word "*certain*." We should rather presume that in such cases as this, where there is no visible injury to the body and no impairment of bodily functions, a verdict for prospective damages must be a mere guess or conjecture. It cannot be proven with either certainty or reasonable certainty, but it can be proven that in such cases the best cure for the injury is the payment of a big verdict. Such cures do certainly occur and show good reason for the statute that in such a case the damage must be certain to result. Of course in ordinary cases we are well disposed to show a proper regard for verdicts found on proof of actual facts, and not on conflicting opinions. But in a case in which a \$26,000 verdict is the result of a mere guess, on a trial conducted in disregard of legal ethics and for a big contingent fee, the duty of an appellate court is to weigh the evidence and to consider the case on its merits. We know that in such cases doctors are brought from a distance and paid liberally for an opinion, and in some cases they may have a contingent interest in the verdict just the same as the attorneys. The leading doctor who testified for the plaintiff has a large bill of charges, with no hope of recovery, unless upon the verdict. The doctor was brought from Jamestown, and the court refused to allow an examination concerning the amount of his fees. The plaintiff was asked concerning the contingent fee of her attorneys and she remembered nothing of it. The opinion testimony of the doctors amounted to nothing. They were entirely safe in testifying as they pleased.

The Impeachment.

An attempt was made to impeach the plaintiff and her witnesses by showing that she and her whole family had just come from testifying in a bankruptcy case of Papamanoles. The testimony given in that case was in effect that at the expense of creditors Papamanoles had just constructed a large Riverside flat, worth some \$25,000 or more; that he had conveyed the same to the mother and gone into bankruptcy. That in a creditors' suit to avoid the conveyance the plaintiff and her family had testified that they had earned the money, gave it to the mother to pay for the flats; that the mother had kept the money in a tin box until she gave it to Papamanoles. The offer was to show that in another big fortune suit the Larson family had all come from swearing to a story incredible and preposterous.

Now it is true that the rules of evidence do change with the changing conditions of society, and when the reason of a rule changes, so should the rule itself. In former times people lived in conditions far different from those which now prevail. They grew up, lived, and died in the same neighborhood. They had more fear of false swearing, more fear of God and the devil. They had no big fortune suits. Hence the method of impeaching a witness was to show his character for truth and veracity in the neighborhood where he lived. Now that method is impossible in new countries where people go about from place to place like Gypsies and do not live in any neighborhood so as to form a character; and now it has come to the point that with many people an oath has no binding force. Hence, I think that in this big fortune case it would have been proper to show the character of the testimony which was given in another big fortune suit. However, under the conceded facts and the law the plaintiff is not entitled to recover anything from the defendant. For negligence and want of care she may be entitled to recover from her mother. Comp. Laws, § 6108. At the time of the accident the mother held the tenement under a lease by which she was bound to keep it in repair. The plaintiff was in the employ of her mother or in the house as the daughter of her mother, and, unless as the servant or the daughter of her mother, she had no right to go upon the back stairway and to be in the backyard when the bricks fell. In going down the stairs the plaintiff was a mere trespasser, unless she was there under the lease to her mother. She stood

in the shoes of her mother and in the shoes of Papamanoles. Keegan v. G. Heileman Brewing Co. 129 Minn. 496, L.R.A.1916F, 1149, 152 N. W. 878. Defendant was under no contractual or legal obligation to guard the plaintiff and to keep the bricks from falling onto her, or to restrain her from going down the stairway at the time of a violent storm.

The complaint avers that for years prior to the accident defendant owned the tenement and that she negligently and carelessly permitted the same to become and to remain dilapidated and the walls and the brick thereof to get out of plumb and in such condition as to create a common nuisance, and that so it remained for many years, and that plaintiff had no warning and she knew nothing of the conditions. Now the latter clause is obviously untrue. Papamanoles, the contractor and builder, the mother, and the whole Larson family had been in the tenement with full sense to observe its condition for a year and ten months. If they shut their eyes and did not observe the conditions of the building, that was their fault. The plaintiff can have no action for negligence, because it depends on some contractual relation; she can have no action for keeping a nuisance in the backyard, as her mother and employer knew of the nuisance, or was bound to abate it and to keep the building in repair. Hence, when the bricks fell she stood in the shoes of her mother.

The condition of the brick veneering was not a nuisance to any person who did not have a legal occasion to go where he might be injured.

The Veneering.

In regard to the veneering, it was not unsafe when the building was rented. From April 3, 1913, until February 3, 1915, one year and ten months, the veneering withstood all the wintry storms and blasts. Then its fall was occasioned by an unusual and violent storm which blew down an adjacent, new, and expensive Ford Motor Vehicle Building. Hence it appears that at the time of the renting, the condition of the veneering did not render the building unfit for occupancy, and the court must know that at any time it was an easy matter to give proper lateral support to the veneering. It might have been done at an expense of \$5 or less by stretching and fastening some woven wire on the outside of the veneering. Now, at the time of the making of the

lease it was well known that the tenement was an old dilapidated building; that was known to every person and it was obvious at a glance. The tenant agreed to take the building as it was and to pay only \$55 a month till it should be put in repair, and then to pay \$100 a month. He agreed "to keep the premises in good condition and in accordance with the existing laws and regulations and ordinances of the city of Fargo." And it was expressly agreed that should any repairs be required on the roof, by reason of leakage or any other cause, then the lessor was to promptly repair the same. It was agreed that the lessor should furnish to the tenant materials for all necessary repairs and that he might order such material and have it charged to her account. The tenant agreed to pay for all the labor necessary to do the carpenter work, building paper, etc. The lessee, Papamanoles, was a contractor and builder. He rented the tenement for eight years, and contracted to do the work of repairing. The contract was for the lessors to furnish the materials and to permit the lessee to procure the same at the expense of the lessor, and until this was done the lessee was to pay only \$55 a month, and then to pay \$100 a month. Those terms of payment fairly indicate that the repairs were to be quite extensive as well as expensive. Under such a lease, if the tenant continued to occupy a dilapidated building for one year and ten months, it was his own fault. While the lessor expressly agreed to repair the roof, the lease contains not a word concerning the repair of the veneering, yet the lease does expressly show that the tenant was to do the repairs, and all the repairs, except on the roof, and the lessor was to furnish the material or to have the same charged to her. Under that agreement the tenant continued to hold possession at the time of the trial three years after the accident, and the plaintiff continued to live in the same tenement. Hence the conclusion is that the tenant agreed to do all the repairs, except on the roof. He "agreed to keep the premises in good condition and in accordance with the existing laws and regulations and ordinances of the city of Fargo." The tenant's failure to make repairs according to the contract, the violent wind storm, and the imprudence of plaintiff in going down the stairway during the storm, that was the proximate cause of the accident.

As I think, the law of the case is well settled by numerous authorities holding that in such a case the landlord is not liable for such an

accident. *Keegan v. G. Heileman Brewing Co.* 129 Minn. 496, L.R.A. 1916F, 1149, 152 N. W. 878.

"When . . . there is no fraud or concealment as to the safe condition of the premises, and the situation is not such as to create a nuisance, the lessee takes the risk of the safe occupancy." *Ibid.*

"The owner of a hotel is not liable to a guest for the fall of an awning known to be unsafe, unless he is bound by the lease to keep the same in repair." *Fellows v. Gilhuber*, 82 Wis. 639, 17 L.R.A. 577, 52 N. W. 307; *Moroney v. Hellings*, 110 Cal. 219, 42 Pac. 560.

As I think, the law of the case is well settled in the case of *Bailey v. Kelly*, 93 Kan. 731, L.R.A.1916D, 1220, 145 Pac. 556.

"When the condition of property is such that it does not impair the public safety the landlord owes no duty to the public or to any member of the public to change the condition. When he comes to deal with a specific individual as a prospective tenant, he owes that individual no duty except not to entrap him by concealing facts which ordinary inspection would not reveal, and he owes no other individual any duty at all. The landlord may in perfect good conscience offer his property, such as it is, to a tenant, who takes it, such as it is, on satisfactory terms, just as the landlord and tenant did in this case. This is true although buildings may be in tumble-down condition, excavations may be unguarded, or the premises may be otherwise uninhabitable or in unsafe condition for use. The only exception is that of property devoted to public use, such as wharves, railroads, elevators, public halls, and the like. Negotiations having been fairly concluded and possession having been given to the tenant, no obligation on the part of the landlord to safeguard or to repair remains unfulfilled. After that, no obligation to repair arises during the tenancy unless the landlord has contracted to do so. This is true even although the tenant create a nuisance on the premises, dangerous to the public."

The judgment should be reversed and the case dismissed; if not, a new trial should be granted, either absolutely, or on conditions that for six months the defendant shall pay to the plaintiff \$700 a month for her own use so that she may obtain good medical treatment and nursing in hospitals and sanitariums of repute, prior to a new trial.

On Rehearing.

GRACE, J. This case has been presented to this court, by the parties
45 N. D.—5.

filing very extended and comprehensive briefs. It was argued orally before it, on December 23, 1918. Thereafter it was thoroughly and long considered, after which, and before a decision was reached by the court, it was ordered reargued, and such reargument was had on November 17, 1919.

Thereafter, a decision was reached, and by a divided court.

Justice Birdzell wrote the majority opinion, which was signed by Chief Justice Christianson and the writer hereof; Justices Bronson and Robinson dissented, in separately prepared dissenting opinions. The majority opinion set forth quite fully the facts of the case, as did the dissenting opinion of Justice Bronson. It will not be necessary to restate those facts.

The majority opinion analyzes and decides most of the controverted points of law presented rightly, with the exception of certain ones hereinafter to be noted, and which must be decided in reverse to their decision, thus necessitating a modification of it, and the reversal of the judgment, which, by it, was affirmed.

In that opinion it was held that it was not reversible error for the trial court to deny defendant the right to impeach the plaintiff, her mother, her sister, and her brother, by refusing defendant's counsel the right and privilege, upon cross-examination of plaintiff's brother, to show that they gave certain testimony in the Federal court, in a proceeding in voluntary bankruptcy, filed by one Papamanoles, and certain testimony, by the same parties, in an action maintained by the trustee, to set aside certain conveyances and mortgages, given by the bankrupt to the mother of plaintiff, all of which testimony was entitled to so little credence, that it was found to be false by the Federal judge who tried the case, who found as a fact that those parties committed perjury in giving such testimony.

The defendant having been refused the right to impeach the above-named witnesses, made the following offer of proof:

"The plaintiff having been sworn in this case, and Mrs. Papamanoles and the brother, Albert Larson, the defendant now offers to prove, on cross-examination, for the purpose of impeaching the testimony of these witnesses, and as affecting their credibility, that in 1915 and 1916, Papamanoles filed a petition in bankruptcy, in the United States district court, for the district of North Dakota, S. E. Division; that

said petition was a volunteer petition; that prior thereto, he had conveyed all of his property, of every kind and description, to his mother-in-law, and the grantee in the deed and the mortgagee in the mortgage was Emma Larson, his mother-in-law; that these conveyances were made with intent and purpose of defrauding his creditors; that he then entered into a conspiracy with the witness Albert, that was on the stand, and his sister, the plaintiff in this case, and with his wife, to commit the crime of perjury; that these people named, testified in the United States district court, in substance, that the mother-in-law, the grantee and mortgagee in the instrument, had a large sum of money, that was transmitted to her, by her daughters and by her sons, amounting to several thousand dollars, which she kept in a box, hidden in the cellar of her residence, in Minnesota; that this money was sent to her, by her sons, including the witness on the stand, who was in the employ of various railroads and lumber companies, in the form of bills and currency; that this money was never put in any bank, but was delivered to Papamanoles, in the construction of the Riverside Flats; that this evidence was given, not only in the bankruptcy court, but in the United States district court, in an action brought by the Dakota Trust Company, as trustee of the estate of James Papamanoles, against E. L. Watt, L. Maude Hyehmar, Albert Larson, and the Red River Valley Mortgage Company; that a trial was had of those issues and that the plaintiff in this case, her mother and her sister, all of them testified that these moneys were paid in the manner mentioned and described; and that they were represented by the Honorable George A. Bangs, of Grand Forks, and the trustee was represented by Watson, Young and Commy, and that Judge Amidon *found, as a fact, in that case, that these parties committed perjury in fact*, and set aside by a decree, that was made on or about the 5th day of July—between the 5th and 8th day of July, 1917; that Papamanoles, Emma Larson, and the parties mentioned, had conveyed the property known as the Riverside Flats, with the intent and purpose of defrauding their creditors out of their just debts and liabilities, and set aside and canceled the deed and mortgage.

"The defendant offers this proof for two purposes. For the purpose of showing that shortly after the decree was handed down, and within a short time, preparations were made to bring this case, which was

brought on the 27th day of January, 1917, within a few days before it outlawed, and that prior to that time, the plaintiff in this action, as well as her relatives, had endeavored to consult lawyers in the city of Fargo, and that they had advised her she had no case, and that this case was brought because, and for the reason, *that the whole family had lost all their property and interests*, and that the evidence is admissible for the purpose of affecting the general credibility of the plaintiff, her sister, her brother, and the whole family; and the same offer is made, with reference to each witness specifically that has testified in this case."

The plaintiff, to the offer, interposed the following objection: "The offer is objected to as incompetent, irrelevant, and immaterial; not admissible as cross-examination of the witnesses, and as not being admissible under the pleadings, no foundation having been laid for the testimony, and for the further reason that the same calls for collateral issues, wholly without the record and without the case."

The court denied the offer. It stated, however, that any evidence which would tend in any manner to impeach the testimony of any witness, in reference to the issue, which was on trial, would be admitted.

Prior to the time of making the offer, the defendant, by specific questions directed to the witnesses, upon their cross-examination, or to some of them, whose testimony she was endeavoring to impeach, sought thereby to elicit the facts, or a considerable portion of them, which are set forth in the offer.

In determining whether or not prejudicial error was committed by the trial court, in sustaining the objection to the questions, and in not permitting answers thereto, and in denying the offer of proof, it is proper to assume that the defendant could have proved the facts contained in the offer, and that the facts inquired about in such questions, if allowed to have been answered, would likely have been established thereby.

It is not necessary to set forth the specific questions. They were objected to, and the objection was sustained. Hence no answer to them was permitted, and for this reason the offer was made.

The facts in the bankruptcy case, and in the action in the United States district court, as recited in the offer, or included in the impeaching questions, have no relation to this case, other than the right claimed.

to show those facts, for the sole purpose of impeachment of the witnesses above mentioned.

To determine their admissibility for this purpose, it is proper to to visualize the cardinal elements of the bankruptcy suit, and the suit in the United States district court, as set forth in the offer.

Concisely stated, they are as follows:

Filing a voluntary petition in bankruptcy by Papamanoles. Prior thereto a transfer of all his property to his mother-in-law, by deed and by mortgage; then a conspiracy with his wife, Albert Larson, and his sister, the plaintiff, to commit the crime of perjury, to show by their testimony that the mother-in-law had a large sum of money, amounting to several thousand dollars, sent to her by her sons, including Albert Larson, who were employed by railroads and lumber companies; that she never put the money in the bank, but kept it in a tin box, and delivered it to Papamanoles, to be used in the construction of the Riverside Flats. That the plaintiff, the mother and sister, and all, testified the money was paid in the manner mentioned and described.

If Judge Amidon found the parties committed perjury in fact, and if he further held that Papamanoles and Emma Larson, and the parties mentioned, had conveyed the property known as Riverside Flats for the purpose of defrauding the creditors; and if these parties had conspired together in those cases, to commit perjury, in order to defeat the claims of the creditors; and if they were confederating and acting together in this fraudulent manner, to gain a large sum of money, amounting to several thousand dollars; and if the entire transaction was one of fraud and conspiracy, supported by perjury, would it not be proper to permit those facts, if they existed, to be shown in another and different action, in which the same parties were acting together, one of them as plaintiff, and the remainder, as witnesses for her, where it was sought to recover from this defendant, the sum of \$35,000 as damages for alleged personal injury to plaintiff, alleged to have been caused by defendant's negligence, where the latter suit was brought shortly after the same parties were thwarted in the actions in the United States court, and where this action was brought just before the Statute of Limitation became effective as a bar to it, and where the sole purpose of showing all such facts is for the purpose of impeaching them, as witnesses, and this, upon their cross-examination.

We are of the opinion not only that it was proper to permit such proof in that manner, but reversible error to exclude it.

There are many ways in which the credibility of a witness may be affected. Credibility is almost as broad as character, which is composed of many moral elements; as, for instance, integrity, veracity, chastity, etc.

The offer of proof does not attack alone the veracity of the witnesses, but as well their integrity in financial transactions.

Papamanoles, his mother-in-law, and these witnesses, who were sought to be impeached, if they conspired to defraud the creditors of Papamanoles, as appears from the proceedings in the United States court, as shown by the offer, were acting in a dishonest manner in the transactions, which were subjected to the scrutiny of the United States court, and that court, according to the offer of proof, set aside the dishonest transfers of property therein involved, as in fraud of creditors.

It would seem that, where the same parties are witnesses in this case, in support of plaintiff's claim, and, upon their cross-examination, for the purpose of impeaching them, or any of them, and for the purpose of affecting the weight to be given their testimony, by the jury, it would be proper to receive such evidence as tending to show their dishonesty, in the bankruptcy proceedings, etc. For, if they acted dishonestly in those matters, the jury might not give so much weight to their testimony in this case, where another large sum of money is involved, and it might analyze and weigh their testimony, with much more care, than it would were their honesty in no manner attacked; and, upon this theory, we think it was prejudicial error for the court to deny the offer.

We think the testimony included in the offer should have been admitted for the further purpose of affecting the credibility of the witnesses, as showing they had an interest in this case. If they conspired to defraud the creditors of Papamanoles, the inference is that they were to get some benefit by doing so.

If they would conspire to commit perjury and act in a dishonest manner in that case, it might follow that they would pursue the same tactics in this, for the purpose of gaining a profit, in event this case resulted favorably to the plaintiff.

As affecting their credibility in this particular case, their conspir-

acy and dishonesty, if any, to defraud their creditors in the other cases, of a large amount of money, would, we think, have a direct bearing on their credibility, and as going to the determination of whether they had any interest in the particular case.

This principle is well illustrated, and clearly discussed in the case of *State v. Malmberg*, 14 N. D. 526, 105 N. W. 614.

If Judge Amidon found that the witnesses committed perjury in fact, in giving their evidence, it is not to be assumed that such conclusion would affect the credibility of the witnesses to the same degree as if they had been convicted of the crime of perjury, but neither does it follow that it is not in some degree impaired. Were they so convicted, it would necessarily follow that their general credibility for truth and veracity would be greatly impaired. However, in that event, it would remain for the jury to say what weight should be attached to their testimony, or whether it would disregard it entirely; or it might take it into consideration, in connection with other testimony corroborating or tending to corroborate it.

If they testified falsely in the United States court, and if Judge Amidon so found, though all such matter is collateral to the issues in this case, it was proper to prove it, as a circumstance affecting the credibility, in testing the truth and veracity of such witnesses in this case. It does not follow from this, that where one witness testifies positively to the existence of a state of facts, and another testifies directly contrary thereto, that one or the other is guilty of perjury. That is not the condition with which we are dealing.

If in the United States court it was found as a fact that these witnesses perjured themselves, and if the court set aside the deed and mortgage by reason of the fraud and perjury existing in those cases, that presents a different condition than a mere direct conflict of testimony in regard to a material fact. It amounts to something more than that.

As it appears to us it would be a circumstance permissible to be shown upon cross-examination for the purpose of testing the credibility of the witnesses.

It is the general rule that where it is sought to impeach a witness by endeavoring to show his lack of credibility in regard to truth and veracity or honesty, that the inquiry must relate to his general reputation for truth, veracity, or honesty, or whichever is in question, in the community in which he resides.

To the general rule there perhaps are some exceptions; for instance, if his credibility were being attacked on the ground of his disregard for truth and veracity, and it should appear that he had stated to a certain person that for \$50 he would testify falsely in any case, it would seem the person to whom such disclosure was made should be permitted to testify to such fact for the purpose of impeachment of such witness.

It would seem this would be a circumstance which would be some proof of his disregard for truth and veracity, though it is an independent circumstance which, perhaps, is not included in the facts which go to make up his general reputation for truth and veracity. And so it would seem, on this principle, that if it were a fact, that the witnesses in question testified falsely in the cases in the United States court, and if that were found as a fact by the trial court who presided at the trial of those cases, that such would be a circumstance which might be shown upon the cross-examination of those witnesses for the purpose of impeaching them, and in this regard is competent evidence for testing their credibility for truth and veracity.

We think it is clear from what has been said that the exclusion of the testimony sought to be introduced for the purpose of impeachment, and the denial of the offer of proof was prejudicial, reversible error necessitating the granting of a new trial.

We think, on all the reasons stated, the judgment appealed from should be reversed, and the case remanded for a new trial.

It is so ordered.

The appellant is entitled to her statutory costs and disbursements on appeal. The costs of the trial court to abide the result of the new trial.

ROBINSON, J., concurs.

BRONSON, J. After rehearing, I concur in the opinion of Justice Grace, which finds that the trial court prejudicially erred in refusing to admit testimony proffered by the defendant upon cross-examination. I concur in the reversal of the judgment, and in the unconditional granting of a new trial as stated by Justice Grace.

On Motion to Reconsider.

ROBINSON, J.

"Open your mouth and shut your eyes
And I will give you something to make you wise."

Such is the plea of plaintiff's counsel. By a great theatrical play and by very questionable means, they have obtained a personal injury judgment for \$26,000. On this they have filed a lien for \$11,000, and now on the motion for a new trial they beg the judges to shut their eyes to the light of truth, the facts in the case, the manner of conducting the trial, the way the plaintiff has been kept in seclusion, under lock and key, by her elder sister and Papamanoles, who were living together without being married. They wish the judges to shut their eyes to the way in which Papamanoles, the head of the Larson family, attempted to get rich at the expense of his creditors, his building the Riverside Flats, mortgaging the same to his mother-in-law for \$15,000, conveying the same to her for \$20,000, going into bankruptcy, taking with him into the Federal court the whole Larson family to swear that they had loaned him the money to build the flats. The judges are requested to shut their eyes to the way in which the suit was first commenced against the city of Fargo to recover for the injury, \$10,000, with no claim that the plaintiff had been paralyzed.

By Justice Robinson an order was duly made, and by the clerk a copy of the same was mailed to counsel for each party. It recites that on the motion for a new trial the judges of the supreme court are about equally divided; that the case is shrouded in doubt and mystery, and it invites counsel on each side to submit and file with the clerk further proof, by affidavits, depositions and proper documents, bearing on the merits of the motion.

In *Neer v. Live Stock Sanitary Bd.* 40 N. D. 340, 168 N. W. 610, 18 N. C. C. A. 1, a majority of the judges being in favor of permitting the killing of two good work horses, Justice Robinson made a similar order, directing counsel to submit additional testimony, with a photograph of the horses. Such evidence was received and the good horses were saved—and that put a stop to the needless killing of good sound horses. It is a mere mockery of justice and an insult to the judges to

say that they are bound to shut their eyes to the light of truth and to swallow and confirm a verdict, when they have good reason to believe that it was wrongfully obtained. The new evidence throws a glare of light on the conduct of the case. It shows the plaintiff is still kept in confinement at the home of Papamanoles. For the purpose of ascertaining her present condition, at the request of defendant's counsel, Dr. McGregor went to the door, stated his reasons, and asked to see the plaintiff, but his request was promptly denied by her sister, Mrs. Papamanoles. Why was that? Was it not to keep the court in darkness? If their deeds and their conduct are not evil, why are they afraid of the light?

It is over a year since Justice Robinson wrote and submitted to the judges his first opinion in this case. It is over two years since the trial. Was it not proper that the judges should know the present condition of the plaintiff? What if the proof were positive that she had completely recovered? Would the judges be still bound to open their mouths and shut their eyes and to confirm the verdict?

In addition to the very important newly discovered evidence, showing that plaintiff first sought to recover \$10,000 against the city of Fargo, we have now certified documents:—

January 19, 1915. Mortgages by James Papamanoles and his wife, Selma, to Emma Larson, his mother-in-law, consideration, \$15,000, on Riverside Flats.

June 8, 1915. Warranty deed by James Papamanoles and wife, Selma, to Emma Larson, mother-in-law, consideration, \$20,500.

December 9, 1915. Mortgage, Emma Larson to Helma Larson, Manda Larson, Albert Larson, same property, consideration, \$6,420.

April 21, 1911. Marriage license to James Papamanoles and Selma Larson.

February 9, 1916. The marriage of James Papas and Selma Larson, in Polk county, Minnesota.

Thus it appears that prior to February 9, 1916, James Papas and Selma Larson were playing husband and wife without being married. It tends to show they are actors. Selma is the keeper of the plaintiff and her main witness. "James Papas" must have known as much as Selma, and more too, in regard to the Riverside Flats, but they did not dare to put him on the witness stand.

On the trial defendant was denied the right to impeach the plaintiff and all her witnesses by showing how Papas built the flats at the expense of his creditors, went into bankruptcy and in the United States court he and each of the Larson family testified that they gave Papas the money to build the flats, as represented by the big mortgage and the deed. Of course that testimony was highly material, because in one big fortune suit no jury would have believed the witnesses had it been shown that they had just come from testifying falsely in another big fortune suit.

Then it appears that counsel for plaintiff discredit the verdict. If the plaintiff had sustained injury to the amount of \$26,000, and if she alone was paralyzed, and not the counsel, then, of course, she should have the great bulk of the money and the counsel should be well satisfied with a fee of \$5,000. When they charge \$11,000 (a sum that no court should permit) it must mean that they did something extraordinary; that by some shrewd and theatrical practice they recovered a verdict largely in excess of the real injury. And truly on the trial of the case the theatrical play was so wonderful, it does seem the fitting climax was to cast on the screen: Attorneys' fee, \$11,000.

The motion for a new trial should be granted.

BIRDZELL, J. (dissenting). I dissent from the opinion of the court on petition for rehearing, but deem it unnecessary to add anything to the views expressed in the principal opinion on the question of evidence upon which the new trial is granted. In adhering to the views previously expressed, however, which, if adhered to by the court, would have led to an affirmance, I deem it proper to say that under all the circumstances appearing in this case an affirmance, in my opinion, might well be with a reservation which would permit the defendant to make another motion for a new trial in the trial court upon the ground of newly discovered evidence. This observation is made in view of the forcible contentions of the defendant that the plaintiff's whole case is a sham; that she has become so adept in the art of simulation as to have deceived both the trial court and the jury; and that defendants are now, and if a new trial is granted will be, amply able to demonstrate the fraudulent character of the claim asserted. Obviously this court cannot consider matters which are not of record and which have not previously been considered by the trial court. It could not pass

originally upon a motion for a new trial. In view of the character of the case, therefore, and of the contentions made, I would deem it proper in the interest of justice to affirm the judgment, and give to the defendant the right to make a further motion for a new trial on the ground of newly discovered evidence. Inasmuch, however, as a majority of the court grant a new trial unconditionally upon the ground of prejudicial error, which, in my opinion, does not exist in the record, I dissent from the disposition made of the case in the manner indicated in the opinion on the petition for rehearing and from the reasons therein stated. I adhere to the views originally expressed.

I am authorized to say that Mr. Chief Justice CHRISTIANSON fully concurs in the views expressed herein.

JULIUS J. OSTLUND, Petitioner and Respondent, v. CHRISTINE
ECKLUND, Respondent and Appellant.

(176 N. W. 350.)

Wills—question as to witnessing of will in presence of testatrix for the jury.

In an action brought to revoke the probate of a will on the ground that it was not properly executed, where the evidence showed that the testatrix, a woman eighty-one years of age, signed the purported will by mark the day before her death; that she did not request the witnesses to sign; that they attached their signatures in a room not immediately adjacent to that in which the testatrix was lying; and that the testatrix was facing the opposite direction and could not readily, in her then position and condition, have observed the act of attestation; it is *held*:

1. That the evidence is at least sufficient to form a question of fact for the jury as to whether or not the will was witnessed in the presence of the testatrix.

Wills—contesting on ground of newly discovered facts.

2. Where it appeared that the petitioner had been interested in a prior attempt to contest the probate of the will, but did not discover the facts with reference to the attestation until after the will was probated, he is not precluded from petitioning on the ground of the newly discovered facts.

Wills—declarations shortly before making will not admissible where will is contested on the ground that it was not executed as required by statute.

3. Where a will is contested on the ground that it was not executed in the

manner required by statute, it was not error to exclude declarations of intention made two hours before the purported will was executed.

Wills—questioned verdict—judgment based on special finding.

4. Where a special verdict finds a fact which is conclusive against the validity of the will, it is sufficient to support a judgment revoking the probate of the will, and the proponent of the will is not prejudiced by the failure to submit other questions.

Opinion filed January 3, 1920. Rehearing denied January 30, 1920.

Appeal from district court of Cass County, *Cole, J.*

Affirmed.

Augustus Roberts and Lyman N. Miller, for appellant.

In the contest of a will after probate, the burden of proof is upon the contestant to establish the ground upon which he relies, whether it be the insanity of the testator, the exercise over him of undue influence, or the nonexecution of the will. 1 Ross, Prob. Law & Pr. p. 276; McKenna's Estate, 143 Cal. 58, 77 Pac. 461; Dole's Estate, 147 Cal. 188, 81 Pac. 534; Nelson's Estate, 132 Cal. 182, 64 Pac. 294; Latour's Estate, 14 Cal. 414, 74 Pac. 441; Higgins v. Nethery, 30 Wash. 239, 70 Pac. 489; Comp. Laws 1913, § 9649.

"The court, in weighing the testimony of an interested party, is not bound to accept his statements, even though uncontradicted, if they do not bear the stamp of credibility." Quock Ting v. United States, 140 U. S. 417, 421, 35 L. ed. 501, 502, 11 Sup. Ct. Rep. 733, 734, 851; Keene v. Behan (Wash.) 82 Pac. 885; Gosline v. Dryfoes (Wash.) 88 Pac. 634; Union Invest. Co. v. Rosenwig (Wash.) 139 Pac. 874.

The declarations, made within two hours prior to the execution of the instrument by the testatrix, are a part of the *res gestæ* and should have been admitted by the trial court to show the mental condition of the testatrix at the time she executed the will. 1 Alexander, Wills, last ed. p. 49.

John G. Pfeffer for petitioner.

BIRDZELL, J. This is an appeal from a judgment and from an order denying a motion for a judgment *non obstante* or for a new trial. The action originated in the county court of Cass county and was brought upon petition for the purpose of securing the revocation of the probate of a will. Upon the trial in county court an order was entered revoking the probate, canceling the testamentary letters previously issued, and

granting letters of administration to the petitioner and respondent. An appeal was taken from the county court to the district court and upon trial had before a jury a special verdict was rendered as follows:

Q. 1. "Did the said Mary Westlund (the deceased), at the time she signed said instrument declare to the attesting witnesses that the instrument was her will? Yes."

Q. 2. "Did the attesting witnesses sign said document in the presence of said Mary Westlund? No."

Upon this verdict the district court entered a judgment sustaining the order of the county court.

The facts appearing in the record are as follows: Mary Westlund died February 9, 1917, being at the time about eighty-one years of age. On the day prior to her death she executed a document purporting to be her last will and testament. She had been ill approximately one week and was in a weak and helpless condition. On the day previous to her death, Christine Ecklund, a niece, arrived at her residence to minister to her wants. About 6 o'clock in the afternoon of that day (February 8, 1917) one C. O. Larson brought to the deceased for her signature the document in question. It appearing that the deceased was unable to readily understand English, Larson attempted to explain it in the Swedish language. As there was still difficulty in communicating the explanation, the deceased mentioned the name "Envig" as an indication that the document should be handed to a person by that name who was present. It was then handed to Envig who was an old acquaintance with whom the deceased had transacted business. He took it, went to the other side of the bed, and asked the deceased in Norwegian: "Do you want to give it to Christine?" to which the deceased replied "Ya." She then made her mark on the document. Following this there was some further talk in English among those who were present in the sick room and then they went to the kitchen where the witnesses affixed their signatures to the purported will. These facts will be considered in greater detail in the discussion of the questions presented on this appeal.

The appellant raises four main questions:

(1) It is contended that the evidence is insufficient to show that the will was not signed by the attesting witnesses in the presence of the deceased.

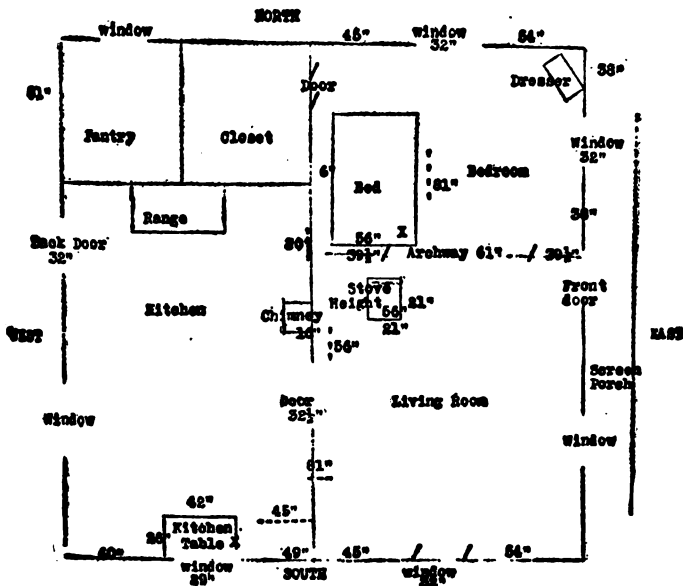
(2) That the evidence is insufficient to show that the petitioner, Ostlund, did not have knowledge of the facts set forth in his petition prior to the admission of the will to probate.

(3) That the court erred in refusing to admit declarations of the deceased relative to testamentary intention, made some two hours before the document was executed.

(4) That the special verdict is not sufficient.

We are of the opinion that the evidence in this case is at least sufficient to form a question of fact for the jury as to whether or not the subscribing witnesses signed in the presence of the deceased. The rough sketch below indicates the position of the testatrix relative to the table used by the witnesses in subscribing their names. The "X" in the corner of the bed indicates approximately the position of the head of the testatrix and the "X" on the kitchen table the location of the witnesses when signing the will.

FIGURE.



There is a conflict in the testimony as to whether the door between the kitchen and the living room was open sufficiently to give a clear view from the corner of the bed to the kitchen table, but the witnesses are agreed that the stove stood at the place indicated which is directly in the line of vision from the bed to the kitchen table. Furthermore, it appears that the deceased was facing north and in her condition, as described by the various witnesses, she could not well have observed what was going on behind her at such a distance. The jury could fairly infer from all of the circumstances that the witnesses were not in her conscious or mental presence at the time they signed as witnesses to the will. It is significant, too (though the contest is not based on this ground), that there is no testimony in the record that the deceased requested anybody to sign the document as a witness. We are of the opinion that on all of the evidence the jury might well have found not only that the witnesses did not sign in the presence of the testatrix, but that she was not aware of the fact that the will was being witnessed at all.

The only testimony in the record with reference to the time when Ostlund, the petitioner, first obtained knowledge of the facts set forth in his petition with regard to the manner in which the will had been executed, is the testimony of Ostlund himself, and in this it appears that while he had been instrumental in encouraging an earlier inquiry into the disposition of the property of his deceased aunt, he had not, in fact, learned the circumstances in which the will was executed until after it was admitted to probate.

As to the contention that the court erred in refusing to admit declarations of the deceased relative to her testamentary intention, it need only be said that the will is not contested here on the ground of lack of testamentary capacity, nor on any other ground which would make declarations of intention prior to the execution of the will material. It was sought merely to show what the deceased had stated some two hours before the will was executed at the time she called Envig presumably for the purpose of having the will drafted. There is no contention that the will does not conform to what ever intention may be deduced from the declarations sought to be established. The contest is on the ground that the will was not executed in the manner required by statute. Comp. Laws 1913, § 5649. Neither were these declarations so

closely connected with the act of execution as to be part of the *res gestæ* of that act. Even if they be so considered, however, they do not tend in the least degree to supply the essentials that the lacking to constitute a due execution; so their exclusion would be nonprejudicial.

The appellant's contention that the special verdict is not sufficient is without merit for the reason that the answer to question No. 2 is decisive of the issues raised by the petitioner. If the witnesses did not sign the document in the presence of the testatrix the document is not legally the last will and testament of the deceased and it would be the duty of the court to enter a judgment for the petitioner based upon the answer to this question alone. In brief, the special verdict is sufficient to support the judgment. The jury was properly instructed as to the meaning of the term "presence" used in the question, and, under the evidence, the jury's verdict is conclusive in petitioner's favor.

For the foregoing reasons the judgment and order appealed from are affirmed.

BERT D. KECK, Appellant, v. A. J. KAVANAUGH, Respondent.

(177 N. W. 99.)

Evidence—where architect agreed to draw plans for building, the cost of which building was not specified, evidence was admissible to show what the understanding of the parties was as to the cost.

1. The plaintiff, who is an architect, entered into a written contract with the defendant, by which he agreed to furnish plans and specifications "for a theatre, store and apartment building for site 65x125 feet, to be erected in Grand Forks, North Dakota," for which the defendant agreed to pay a certain per cent of the cost of the building. Nothing was said in the contract about the cost of the building. It is *held* that evidence was admissible to show that it was the understanding of the parties that the building should not cost more than \$60,000.

Evidence—evidence showing the amount and value of the work of architect in preparing plans and specifications inadmissible.

2. Certain evidence offered by plaintiff for the purpose of showing the amount and value of the work done in preparing the plans and specifications

NOTE.—On architect's underestimate of cost of structure as basis of a claim or defense against him, see note in 42 L.R.A. (N.S.) 125.

45 N. D.—6.

and the contents of letters written by him to various contractors who submitted bids for the proposed building, *held* properly excluded for reasons stated in the opinion.

New trial — granting of same on grounds of newly discovered evidence is discretionary with the trial court.

3. A motion for a new trial on the ground of newly discovered evidence is addressed largely to the sound, judicial discretion of the trial court. Such discretion is to be exercised in determining the diligence shown, the truth of the matters stated, and the materiality and probability and the effect of them, if believed to be true. It is presumed that the discretion was properly exercised; and the appellate court will not interfere unless an abuse of such discretion is clearly shown.

Opinion filed January 10, 1920. Rehearing denied January 30, 1920.

Appeal from the District Court of Grand Forks County, *Cooley, J.* Plaintiff appeals from a judgment and from an order denying a new trial.

Affirmed.

Murphy & Toner, for the appellant.

"Where the question as to the consideration to be paid in an express contract rests in parol, and there is a dispute between the parties, the courts hold that it is proper to admit evidence as to the reasonable value of the work. *Munster v. Stoddard*, 44 N. D. 105, 170 N. W. 871.

"On an issue as to whether or not a contract was made as claimed any circumstances bearing thereon or any evidence which tends to render that fact probable or improbable is relevant." *Tamban v. Moran*, 31 Mich. 280; *Valley Lumber Co. v. Smith*, 37 N. W. 412; *Carpenter v. Lennane* (Mich.) 132 N. W. 479.

It is generally held that where the newly discovered evidence is in the form of admissions made to third persons, the showing made here is sufficient. *Feister v. Kent*, 60 N. W. 493; *Eckel v. Walker*, 48 Iowa, 225; *Moran v. Freidman*, 88 Hun, 515, 34 N. Y. Supp. 911; *Murray v. Weber*, 60 N. W. 492; *Ry. Co. v. Lovelace* (Kan.) 45 Pac. 590.

Bangs, Hamilton, & Bangs, for respondent.

To make it proper evidence for consideration, the newly discovered evidence must be decisive of the result. *Pengilly v. Case Machine Co.* 11 N. D. 254; *Keystone Grain Co. v. Johnson*, 38 N. D. 562; *Echstrand v. Johnson*, 168 N. W. 824.

"A motion for a new trial upon the ground of newly discovered evidence is not regarded with favor. The policy of the law is to require of parties, care, diligence, and vigilance in securing and presenting evidence." *Canfield v. Jackson*, 112 Mich. 120, 70 N. W. 444; *Garazewski v. Wurm*, 69 N. W. 871.

CHRISTIANSON, Ch. J. Plaintiff brought this action to recover a balance claimed to be due him for services performed for the defendant under the following written contract:

"THIS AGREEMENT, made the 7th day of May, in the year one thousand nine hundred and eighteen by and between Bert D. Keck, architect of Grand Forks, North Dakota, party of the first part, and A. J. Kavanaugh, owner, of Grand Forks, North Dakota, party of the second part.

"The architect agrees to prepare and furnish preliminary sketches, working drawings, necessary details, specifications, draw contracts between owner and contractors and to give general supervision during building operations for a theater, store and apartment building for site 65 x 125 feet, to be erected at Grand Forks, North Dakota, for the owner, for a compensation of five per cent of the total cost of the work. Additional compensation to be charged for residence work, alterations, or special work, as may be agreed upon.

"For all work outside of the town in which the architect lives the owner to pay all necessary traveling and hotel expenses.

"The owner agrees to pay the architect three and one half per cent of the total cost of the work when bids are opened and one and one half per cent when the work is completed.

"If work is postponed or abandoned after the preliminary sketches are made, the owner agrees to pay the architect one and one quarter per cent of the architect's estimated cost, or three and one half per cent when plans and specifications are entirely complete.

"To be built on DeMers avenue, when owner desires. Plans shall include building complete with seating. Bids to be taken and compensation to architect to be based on lowest bids received on various parts.

"Drawings and specifications are instruments of service, and as such are to remain the property of the architect.

[Signed] Bert D. Keck,
A. J. Kavanaugh."

The complaint alleges that the plaintiff pursuant to said contract performed the services specified therein; that the lowest bid upon the work specified in the plans and specifications for the building was the sum of \$96,364.75; that bids were received and opened on or about June 1, 1918; that under the terms of said contract there became due and owing to the plaintiff for the services so performed the sum of \$3,372.76; that no part of the same has been paid except \$750, and that payment of the balance has been refused.

The answer admits the execution of the contract, but avers that prior to the execution thereof the plaintiff was specifically informed by the defendant that the defendant did not have and could not expend for the proposed building any sum in excess of \$60,000; and that the plaintiff must prepare plans and specifications for a building that could be constructed complete for not to exceed said sum; that plaintiff assured and promised defendant that the building so to be provided for in the plans and specifications to be prepared by the plaintiff would not cost more than \$60,000 fully completed; that defendant entered into the written contract with this understanding, and in reliance upon said promises and assurances of the plaintiff, and would not have entered into a contract for the preparation of plans and specifications for any building costing any greater sum than \$60,000; that the plans prepared by the plaintiff was not for a building costing \$60,000, but for a building costing \$96,364.76, according to the lowest bid received for the construction thereof; that the plans and specifications prepared by the plaintiff were valueless to the defendant; that he paid plaintiff \$750 before he became aware of the fact that the plans and specifications were not as agreed upon. The defendant therefore demands that the action be dismissed, and that he have judgment against the plaintiff for \$750, the amount paid him by the defendant. The plaintiff replied, denying the new matter in the answer. The case was tried to a jury upon the issues thus framed. The jury returned a verdict in favor of the defendant for the amount of his counterclaim. The plain-

tiff has appealed from the judgment and from the order denying his motion for a new trial.

Plaintiff specifies the following reasons why the judgment should be reversed and a new trial ordered:

(1) That the court erred in permitting the defendant to introduce testimony to the effect that it was understood and agreed between the parties that the cost of the building for which plans and specifications were to be drawn by the plaintiff was not to exceed \$60,000.

(2) That the court erred in refusing to permit the plaintiff to introduce evidence tending to show the actual cost to the defendant of preparing the plans and specifications involved in this action.

(3) That the evidence introduced and submitted to the jury is insufficient to support the verdict.

(4) That the plaintiff was entitled to a new trial, particularly upon the ground of newly discovered evidence.

The questions will be considered in the order stated.

(1) Plaintiff contends that the rights and obligations of the parties were fixed by the written contract, and that the testimony adduced by the defendant to the effect that there was an understanding between the parties that the building plans provided for in the contract should be for a building which might be constructed at a cost of not to exceed \$60,000 was inadmissible on the ground that it tended to contradict and vary the terms of the written contract.

We do not believe that the contention is sound. The rule invoked applies to unambiguous writings which on their face evidence a complete agreement between the parties. In such case, in absence of fraud or mistake, it is conclusively presumed that the whole engagement of the parties is expressed in the writing, and the parties are precluded from introducing parol evidence for the purpose of contradicting, varying, or altering, the terms of the writing. Nor may collateral parol agreements which add to or detract from the terms of the writing be shown, if they have the effect of contradicting, varying, or altering the terms thereof. But where the writing shows that it is not a complete statement of the entire transaction, as where it is silent as to some matter which is essential to a proper understanding and interpretation of the writing; and where the parol evidence is offered to show the existence of an oral agreement entirely consistent with the

terms of the writing, then the rule contended for does not apply. 9 Enc. Ev. 345-351; 10 R. C. L. pp. 1019, 1030-1032. This is recognized both by our statutes and decisions. See *Putnam v. Prouty*, 24 N. D. 517, 140 N. W. 93, and statutory provisions considered in that case.

It will be noted that the written agreement in this case is entirely silent upon the question of the cost of the building, as well as upon its height and the materials of which it is to be constructed. It would be strange indeed if there was no understanding whatever as to these matters. The contract might have reference to a two-story frame building to cost \$15,000, or it might have reference to a ten-story brick building to cost \$500,000 or more. It would be equally applicable in either case. The evidence as to the parol agreement with respect to the cost of the proposed building did not tend to contradict or vary the terms of the written contract. The parol agreement sought to be established by such evidence was entirely consistent with the terms of the writing. The following language used by the supreme court of Kansas in considering a similar question is quite applicable here: "How high shall the building be? How is it to be finished? How much is it to cost? There must be something outside the contract to determine these questions. The plaintiff must have had instructions outside the contract with which to undertake to comply, in the preparation of his plans. One of those instructions must have been concerning the cost of the building, and the outside agreement or understanding between these parties concerning the cost of the building does not contradict or vary the terms of this contract. Such an understanding merely supplies an omission in the contract, which omission must be supplied before the contract can be complied with." *Bair v. School Dist.* 94 Kan. 144, 146 Pac. 347.

(2) It is next contended that the court erred in refusing to permit the plaintiff to show the amount of work done and the number of persons engaged in preparing the plans and specifications. It is contended that that evidence was admissible as bearing upon the probabilities of the case, i. e., whether it was probable that the plaintiff would have agreed to perform the amount of work which he did if the amount of his compensation was to be computed on the basis of a building costing not to exceed \$60,000. After a careful consideration we have reached

the conclusion that the trial court ruled correctly in excluding such evidence. It is true "a contract may be explained by reference to the circumstances under which it was made and the matter to which it relates." Comp. Laws 1913, § 5907. And even in an action on an express contract for services performed, evidence of the reasonable value of such services is admissible, where there is a dispute as to the compensation fixed by the contract. In such case the evidence is admissible, not as a basis for the amount of recovery, but as bearing upon the probabilities of the case; that is, it is admissible for the reason that it affords the jury a view of the conditions and circumstances existing at the time the contract was made, and hence may furnish the jury some aid in determining which of the conflicting statements is more likely to be true. *Munster v. Stoddard*, 44 N. D. 105, 170 N. W. 871. But the evidence offered by the plaintiff did not relate to any fact or condition existing at the time the contract was made. It had reference solely to acts performed by, and wholly within the control of, the plaintiff subsequent to the time the contract was made,—acts over which the defendant had no control, and upon the performance of which no estoppel or admission against his interest could be predicated.

(3) It appears that after the bids had been submitted the plaintiff made certain changes in the plans which had a tendency to decrease the cost of the building and he wrote letters to the various bidders asking them to submit new bids upon the plans as altered. Later he wrote other letters to the different bidders advising them that it would be impossible to go ahead with the work because structural steel could not be obtained for the construction of the proposed building on account of a certain order made by the War Industries Board. The plaintiff offered these various letters in evidence, but they were excluded upon defendant's objection. Error is assigned on this ruling. Little or no argument is submitted in support of this contention. We are of the opinion that the ruling was correct.

(4) It is next contended that the evidence is insufficient to sustain the verdict. It is conceded that the defendant testified to a state of facts which is in accord with the verdict, but it is contended that the facts and circumstances shown by other evidence in the case is so at variance with the testimony of the defendant that that testimony should not be believed. We are unable to agree with this contention.

There are certain facts and circumstances which tend to contradict defendant's testimony, but there are other facts and circumstances which tend to corroborate it. The weight and sufficiency of the evidence were for the jury. It requires an extraordinary case to authorize the court to regard sworn testimony as manifestly impossible or untrue. 10 R. C. L. p. 1008, § 198. No such situation exists in this case. Primarily, the question in this case was whether the arrangement was as testified to by the plaintiff, or as testified to by the defendant. The jury believed the defendant's version of the matter; and, as we view it, the jury's finding has substantial support in the evidence.

The question of the sufficiency of the evidence was also submitted to the trial judge, and he refused to disturb the verdict. The following language used by this court in *Munster v. Stoddard*, *supra*, is directly applicable here: "The jurors who heard the testimony and saw the witnesses in this case, by their verdict, said they believed the plaintiff's version of the matters in dispute between the plaintiff and defendant. The trial judge, who also heard the testimony and saw the witnesses, as well as the jurors and attorneys, and was familiar with all the incidents of the trial, by his order denying a new trial, said in effect that he was aware of no justifiable reason for granting a new trial. It is well settled that where there is any substantial evidence to support a verdict, the granting or denial of a new trial on the ground of insufficiency of the evidence rests in the sound judicial discretion of the trial court, and the ruling will not be disturbed unless a clear abuse of discretion is shown."

(5) It is next contended that the trial court should have granted a new trial on the ground of newly discovered evidence. The proposed newly discovered evidence is set forth in the affidavits of five persons who claim to have submitted bids for the construction of the building, or for the installation of heating and plumbing therein, or for the hardware to be used in constructing the building. These persons claim to have been present at the time the bids were opened and they say that at that time the defendant expressed no surprise by word or act at the amount of the bids; and made no statement whatsoever indicating that he was in any manner disappointed or discouraged by reason of the amount of the bids; and made no statement to the effect that he would have to abandon the project on account of the cost of the work as shown

by the bids received. In addition to this the affidavit of one Larson is to the effect that the lowest bids received for the construction of the building in accordance with the plans and specifications was, in his opinion, too low to afford a reasonable profit to such bidders if they had been awarded the contract; that the preliminary plans and specifications were most complete and showed in great detail the work and material requisite in the construction of the building; that it would be impossible to determine or estimate within many thousands of dollars the cost of such building under the conditions existing in the summer of 1918, or at any time, until after bids were received from contractors for the work, or prices for labor and material obtained from those engaged in the business of building and furnishing material.

The affidavit of one Morrow also contains a statement that on the 18th day of July, 1918, he met the defendant in the city of Grand Forks and had a conversation with him in reference to the construction of the building in question, and that in such conversation the defendant stated that, while the cost was higher than he and the architect had expected, he was well satisfied with the lowest bids received for the construction of the various parts of the building; that in his judgment said bids were reasonable considering the character and kind of building which he intended to construct, and that he expected to go ahead with the construction if able to make the necessary arrangements.

Under our laws a new trial may be granted for "newly discovered evidence material to the party making the application, which he could not with reasonable diligence have discovered and produced at the trial." Comp. Laws 1913, § 7660. The exercise of reasonable diligence is, therefore, an express requirement of the statute. The moving party must show, not only that the evidence is newly discovered and that it is material to him, but also, that "he could not with reasonable diligence have discovered and produced" it at the trial. In this case there is really no showing of diligence whatsoever. The plaintiff, Keck, makes an affidavit to the effect that he was not advised by these different persons that they could or would testify to the facts set forth in the affidavits until after the trial of the action, and that he did not know such evidence could be produced on the trial. It appears, however, that all of the affiants are residents of, or represent firms resident in, the city of Grand Forks, where the building was to be con-

structed, the bids opened, and the action tried. Keck was present at the time the bids were opened, and from the evidence adduced by him upon the trial it is manifest that he was fully aware that the proposed new witnesses were also present at that time. Yet he offers no reason for his failure to call these witnesses upon the trial, except the one already stated.

It is elementary that a motion for a new trial on the ground of newly discovered evidence is addressed largely to the sound judicial discretion of the trial court, and that the appellate court will not interfere unless it is shown that such discretion has been abused. *McGregor v. Great Northern R. Co.* 31 N. D. 471, 492, 154 N. W. 261, Ann. Cas. 1917E, 141. The trial court's "discretion is to be exercised in determining the diligence shown, the truth of the matters stated, and the materiality and probability of the effect of them, if believed to be true." *People v. Weber*, 149 Cal. 325, 86 Pac. 671; *Scanlon v. San Francisco & St. J. R. Co.* 128 Cal. 586, 61 Pac. 271; *Hayne, New Tr. & App.* §§ 87, 89; *McGregor v. Great Northern R. Co.* supra. In determining the question of diligence it is the duty of the court "to take into consideration the particular circumstances of each case, with all its distinct and varying phases and bearings, for the purpose of ascertaining what is and what is not diligence, within the contemplation of the statute; and its conclusion upon the point is so peculiarly and exclusively an exercise of discretion, that the appellate court will never be justified in interfering therewith unless the record discloses a clear abuse of discretion." 1 *Hayne, New Tr. & App.* § 92, p. 433; *McGregor v. Great Northern R. Co.* supra.

We are wholly agreed that the trial court did not abuse its discretion in refusing a new trial on the ground of newly discovered evidence.

The judgment and order appealed from must be affirmed. It is so ordered.

BIRDZELL, ROBINSON, and BRONSON, JJ., concur.

GRACE, J. (specially concurring). The result reached in this case by Justice Christianson, the writer of the opinion, is unquestionably correct. It is contended by the plaintiff, that certain testimony introduced at the trial of the case by the defendant, to the effect that there

was an understanding between the parties, exclusive of the written contract, that the building plans referred to in the contract were intended for a building that should be constructed at a cost not to exceed \$60,000, was inadmissible, for the reason that it tended to vary and contradict the terms of the written contract. This contention is without merit, for it is apparent from the written contract it is not complete. It does not cover all the subject-matter of the contract. It does not set forth the cost of the building nor its height, nor does it specify the materials of which it was to be constructed.

These are material elements of the contract; they are among the most important elements of its subject-matter. It would appear to a reasonable mind there must have been some agreement relative to such important matters. These matters not having been included in the written contract it was competent to admit evidence to show that a parol agreement with reference to them was made.

Not only is the rule that such evidence is properly admissible in such case recognized in *Putnam v. Prouty*, 24 N. D. 517, 140 N. W. 93, but it is, also more fully stated in the case of *Gilbert Mfg. Co. v. Bryan*, 39 N. D. 13, 166 N. W. 805, wherein, in the syllabus of that case, appears the following language: "Where a written contract is not complete and where it does not cover the whole subject-matter of the contract, where there is a part of the subject-matter of the contract not incorporated in the written agreement, oral testimony is admissible to establish such part as is not included in the written agreement, or, if the contract is partly written and partly verbal, that part which is verbal may be proved by oral testimony, but in so far as the written contract covers and treats of the subject-matter and sets forth the covenants entered into and terms agreed upon, such written contract and the terms thereof cannot be varied by the introduction of oral testimony."

We are of the opinion the testimony introduced was well within the rule as expressed in the language just quoted, and it was properly admissible.

The main opinion contains, substantially, the following language: Where there is any substantial evidence to support the verdict, the granting or denial of a new trial, on the the ground of insufficiency of the evidence, rests in the sound judicial discretion of the trial court,

and the ruling will not be disturbed unless a clear abuse of discretion is shown.

We are inclined to conclude that the language just quoted involves a contradiction, for, where there is substantial evidence to support the verdict, insufficiency of evidence to support the verdict cannot be present. If it be conceded there is substantial evidence to support the verdict, then it is supported, and there is not an insufficiency of evidence. If there is substantial evidence to support the verdict, and the trial court grants a new trial on the grounds of insufficiency of evidence, when such insufficiency does not exist, in some circumstances, that might constitute abuse of discretion, if the order granting a new trial was granted for this reason only; so that we are very doubtful whether the rule stated in the opinion in this case actually states the correct rule which should govern the trial court in such case.

If the trial court believe the evidence is insufficient to sustain the verdict, and grants the motion for a new trial, it is upon the theory that there is no substantial evidence to support the verdict. Where there is substantial evidence to support the verdict, there is hardly any room for the exercise of the trial court's discretion, for the weight and sufficiency of the evidence are for the jury, and, if the evidence is substantial, and the jury have found a verdict in accordance with it, it has determined the sufficiency.

Substantial evidence is sufficient evidence, and, in such case, insufficiency does not exist. In this case the evidence is quite sufficient to sustain the verdict.

ARTHUR C. MITCHELL, Appellant, v. GRANT S. YOUMANS,
Respondent.

(176 N. W. 101.)

Torts — effect of failure on part of plaintiff to allege and prove a cause of action.

In an action to recover damages which the plaintiff claims to have suffered by reason of oppressive conduct of the defendant in connection with a loan transaction had between the plaintiff and a corporation of which the defend-

ant was president and manager, it is held, for reasons stated in the opinion, that the plaintiff failed to allege and prove a cause of action.

Opinion filed January 10, 1920. Rehearing denied January 30, 1920.

Appeal from the District Court of Ward County, *H. E. Leighton, J.*
Affirmed.

McGee & Goss, for appellant.

"On the other hand the officers and agents of a corporation cannot escape liability for their acts of misfeasance or malfeasance on the ground that they were acting for the corporation." *Peck v. Cooper*, 112 Ill. 192, 52 Am. Rep. 231; *Wright v. Wilcox*, 19 Wend. (N. Y.) 343, 32 Am. Rep. 507; *Greenberg v. Whitcomb Lumber Co.* 90 Wis. 225, 63 N. W. 93, 48 Am. St. Rep. 911 and note, 28 L.R.A. 439; *Wines v. Crosby Co.* (Mich.) Ann. Cas. 1913D, 1058 and note.

"When proof of a statement is introduced for the purpose of establishing the fact that a party relied and acted upon it is not objectionable on the ground that it is hearsay." 10 R. C. L. 959; *Mills v. Riggle*, 112 Pac. 617, Ann. Cas. 1912A, 616, 617; *Kaufman v. Springer*, 38 Kan. 730, 17 Pac. 475; *Chatham Bank v. Hutchinson*, 62 Kan. 9, 81 Pac. 443.

Fish & Murphy, for respondent.

BIRDZELL, J. This is an appeal from a judgment of dismissal entered at the conclusion of the plaintiff's case. The action sounds in tort and appears to be predicated upon certain alleged oppressive conduct of the defendant in connection with a loan transaction had between the plaintiff and the Savings, Loan, & Trust Company, of which the defendant was president and general manager. A consideration of the errors assigned and argued in the brief requires a statement of the facts pleaded as the plaintiff's cause of action. The supplemental complaint consists of some nine pages of typewritten matter in this record and we shall state only the substance of the allegations.

The plaintiff was the owner of a certain lot in Lakeview Addition to the city of Minot. The defendant was president and managing officer of the Savings, Loan, & Trust Company. In March, 1916, the plaintiff mortgaged the property for \$1,100 to the Trust Company,

the latter taking at the same time a commission mortgage of \$77. Defendant knew that the object of the loan was to enable the plaintiff to finish the erection of a dwelling house on the lot and to pay for labor and materials necessary to that end. The reasonable value of the property is alleged to be \$3,000.

It is alleged that soon after the delivery of the notes and mortgages the defendant "V. . . . wilfully and maliciously and for the purpose of wrongfully and fraudulently obtaining title to said property, . . . and to cripple financially this plaintiff and hinder him from the completion of said building, to plaintiff's damage did wrongfully withhold and embezzle or cause said corporation to so do from him contrary to the agreement of said mortgage and contrary to the terms of said mortgage, . . . \$478 of said \$1,100 principal of said loan moneys, . . . all this without any just cause therefor, and to maliciously oppress and injure plaintiff and to further defendant's scheme and purpose to deprive plaintiff of said real estate to defendant's benefit." The succeeding paragraphs allege as further acts of oppression and in furtherance of the defendant's purpose, that the defendant informed lumbermen, materialmen, carpenters and painters, that the plaintiff had used all the amount of the loan, would not be able to pay them, and that the only way they could procure their money would be by filing mechanic's liens. That mechanic's liens were filed and foreclosed to the embarrassment of the plaintiff and to the injury of his credit, resulting in "great damage." In a separate paragraph numbered VII., it is alleged that the plaintiff sustained \$150 damages in the shape of expenses incident to the foreclosure proceedings under mechanic's liens which it would be necessary for him to pay to clear his title. (All the allegations last above referred to as being contained in the paragraphs V. to VII., both inclusive, were stricken out on defendant's motion at the beginning of the trial.)

It is further alleged that in October, 1917, the defendant caused to be instituted foreclosure proceedings by advertisement, based on the \$77 mortgage which is alleged to have been usurious and void. That the foreclosure by advertisement was enjoined at an expense to the plaintiff in this action of \$25. That this was followed by an action which the defendant caused to be instituted in the district court for the foreclosure of the same mortgage. That the foreclosure proceed-

ings terminated in a judgment in favor of the plaintiff against the Trust Company for \$396.18, with interest at 8 per cent from March 14, 1917.

It is also alleged that the defendant had negotiated a sale of the premises to one Johnson, and that while the sale was pending, but before consummation, the "defendant did, to further annoy, vex, and injure and oppress the plaintiff herein" induce Johnson and his wife not to purchase the premises from the plaintiff, and "did wrongfully and maliciously cause the said Johnson to refuse to consummate the sale" to the plaintiff's damage in the sum of \$500 profit the plaintiff would have received on the sale. Also that the defendant "did wrongfully and maliciously terrorize and drive said tenants from said premises of the plaintiff," thereby causing them to remove from the premises, causing loss of rent, to the plaintiff's "great damage." That owing to the failure of the Trust Company to pay the plaintiff the balance due him on the loan, a delay of eight months in the completion of the building was caused, resulting in a loss of \$240 rental value. The prayer for judgment is for \$1,000 compensatory damages and \$1,500 punitive damages.

The first error argued in the appellant's brief is that the court erred in directing a verdict for the defendant. It is contended that under the view most favorable to the defendant the plaintiff was at least entitled to have the jury pass upon his claim for the \$25 expended in enjoining the foreclosure by advertisement. Stripped of all redundancy, the appellant's proposition as to the \$25 item amounts to this: If an officer of a corporation entertains an intention to wrongfully acquire title to property through foreclosure, using the corporation as an instrument, and foreclosure proceedings by advertisement are begun and enjoined, being followed by an unsuccessful foreclosure by action, the officer may be held for the expense incident to the injunction in an independent suit brought for that purpose. This proposition depends upon an element which is not pleaded. If any cause of action existed at all for the recovery of the \$25, it was one for malicious prosecution. This action would not lie against the defendant in the absence of malice. It is clear that for what the corporation did legally in the pursuit of what it deemed to be a lawful remedy, neither it nor the officer who prompted its action is liable, nor is either the corporation or the

officer rendered liable because the latter may entertain a sinister purpose to use the remedy for his personal gain. A lawful remedy does not become unlawful because bad motives might prompt its use in a given case. A bad motive does not of itself constitute a legal injury. If, however, no sufficient cause existed for pursuing a remedy, and either the plaintiff or his active agent were actuated by malice, an action might lie for malicious prosecution. It is apparent upon reading the paragraph of the complaint, concerning the \$25 item, that the plaintiff does not attempt to state a cause of action for malicious prosecution. The whole of the paragraph reads:

"That because of the said acts of oppression of the defendant using, and by and through said Savings Loan & Trust Company, a corporation, of which he was the manager and president, as an instrumentality to further said fraud and oppression, the said Youmans then caused an action in foreclosure to be begun in district court of said mortgage, the foreclosure of which by advertisement the plaintiff herein had caused to be enjoined at an expense to plaintiff of \$25 paid therefor."

The foregoing allegations at most constitute but an element of the damage claimed to have resulted from the alleged oppressive acts of the defendant and must therefore be considered as dependent upon establishing the main cause. It is likewise apparent that the main cause of action (and the complaint purports to state but one cause) is not for malicious prosecution but for various oppressive acts in pursuance of a design to obtain title to plaintiff's property. It is our opinion, after a careful reading of the pleadings and the testimony, that the plaintiff has wholly failed to make out such a cause of action.

Upon reading the entire complaint it is so difficult to ascertain the real gravamen of the action and to gain reliable impressions of the plaintiff's theory of liability that we cannot regard the action of the trial court in striking out portions of the complaint as being erroneous. The Code of Civil Procedure requires only that the complaint shall contain a concise statement of the facts constituting a cause of action without unnecessary repetition, and if the plaintiff was aggrieved at the action of the trial court, he might well have redrafted his complaint in conformity with this simple requirement, so that it would have been possible for the defendant to have understood the grounds upon which liability was claimed. If the action was grounded upon a malicious

prosecution of a civil foreclosure suit, this could readily have been made to appear by proper averments. If, on the other hand, it was conceived to be one in which the defendant was liable for having entertained sinister motives in directing a corporation in the pursuit of its legal remedies and advising others as to what their legal remedies were, no cause of action is stated. For the plaintiff is not harmed by a mere motive or purpose of the defendant, especially as it appears that that purpose (to obtain title to plaintiff's property) was not realized.

To illustrate the defective character of the allegations and the proof, it is necessary to take up for example but one item for which the plaintiff claims recovery, and this is the principal one. It is contended that the evidence showed that the wrongful conduct of the defendant had led to the loss of \$500 through the failure of the prospective sale to Johnson. It is manifest on this record that no such loss resulted. The plaintiff alleges his ownership of the property and does not allege his loss of the title. In fact, he testifies that he is still the owner. The value of the property is alleged in the complaint at \$3,000. The plaintiff further testifies that Johnson entered and occupied the premises under an arrangement for sale, made by Schaft, a real estate agent, and that under this proposition, he, the plaintiff, was to receive \$3,000 in trade. So it appears affirmatively by the allegations of the plaintiff's complaint and the evidence of the plaintiff himself that he was not damaged to any extent through the failure of Johnson to consummate the purchase. Therefore, if Youmans was responsible for the failure of the sale, his act has resulted in no damage to the plaintiff.

The remaining assignments of error as they are argued in the brief attack rulings of the trial court excluding testimony going to establish the reasons why the Johnsons did not consummate the purchase. The materiality of this testimony in the state of the record previously made is not perceived. If the plaintiff is still the owner of the property which is worth all that Johnson agreed to pay, he is not damaged by the defendant's act, if it be conceded that the defendant disrupted the sale. Or if Johnson was under contract to purchase, the acts of the defendant do not constitute a sufficient cause for his breach of contract with the plaintiff. It is therefore immaterial in this case what reasons the Johnsons had for refusing to go on with the purchase.

The foregoing applies as well to the ruling of the trial court in refus-

ing to grant a continuance to permit the plaintiff to secure the attendance of Mrs. Johnson as a witness. It appears from the statement of counsel that she would only testify to matters influencing the decisions of the Johnsons to break off the negotiations for purchase.

The judgment of the trial court is affirmed.

CHRISTIANSON, Ch. J., and ROBINSON, J., concur.

BRONSON, J. I concur in the result.

GRACE, J. I dissent from the result.

JAMES H. TURTON, Appellant, v. BINGENHEIMER MERCANTILE COMPANY, a Corporation, and Oscar Olson, Sheriff in and for Morton County, North Dakota, Respondents.

(176 N. W. 661.)

Conversion — fraudulent conveyances — question was for jury.

This is a suit for the conversion of personal property on which the plaintiff has a chattel mortgage. The answer is that the property was levied on and seized under the writ of attachment against the mortgagor, and that the mortgage was taken with intent to hinder, delay, and defraud creditors. The issue, as presented by the pleadings and the evidence, was one of fact and not law. Manifestly the court erred by directing a verdict in favor of the defendants.

Opinion filed January 30, 1920.

'Appeal from the District Court of Morton County, Honorable W. L. Nuessle, Judge.

Reversed and new trial granted.

Jacobson & Murray, for appellant.

An officer who levies execution on property of a stranger is guilty of conversion, although the levy was made in good faith, and although the property was not actually taken or removed. *Savin v. Chrisman* (Or.) 175 Pac. 622; *Rider v. Edgar*, 54 Cal. 127; *Kratzmar v. Detroit Lumber Co.* (Mich.) 161 N. W. 817.

"The possession of a receiptor of property which has been taken by a lawful writ, is, in law, that of the officer to whom he is accountable." *Irey v. Gorman* (Wis.) 94 N. W. 658; 6 C. J. 317, § 621.

Where the goods of a stranger have been levied upon, and the plaintiff, with knowledge of that fact, refuses on demand to release them, such refusal constitutes a ratification of the wrongful levy. *Cole v. Edwards* (Neb.) 72 N. W. 1045.

Sullivan & Sullivan, for respondents.

A conveyance made pending suit, for the purpose of preventing the collection of such judgment that may be entered will be set aside at the instance of the plaintiff, whether made with or without a valuable consideration. 20 Cyc. 444, 445, 451.

Where the transfer unnecessarily hinders or delays other creditors, such being the purpose of the parties, the transfer will be held fraudulent even though there is an actual indebtedness to be discharged or secured. 20 Cyc. 475; *Daisey Roller Mills v. Ward*, 6 N. D. 100, 58 N. W. 271; *Paulson v. Ward*, 4 N. D. 100, 58 N. W. 792.

ROBINSON, J. This is an appeal from a judgment on a directed verdict in favor of defendants. The plaintiff brings suit as a mortgagee to recover from defendants for the conversion of a lot of personal property levied on under a writ of attachment against his mortgagor.

As it appears, in January, 1918, William Van Dusen made to the plaintiff a mortgage on the property to secure over \$5,000. It was duly filed and it was given to secure the purchase price of the property. Then in two months afterwards, in March, 1918, the sheriff, by direction of the Mercantile Company, levied an attachment on the property. The plaintiff avers and shows that his mortgage has not been paid; that the property attached was reasonably worth \$4,000, and he demands judgment for that sum. Both of the defendants answer and justify under the writ of attachment. Each answer avers that the mortgage was made to hinder, delay, and defraud the creditors of Van Dusen. Of course that was a good affirmative defense.

"Every transfer of property taken with intent to hinder, delay, or defraud any creditor is void against all creditors of the debtor." Comp. Laws, § 7220.

But "in the absence of fraud, every contract of a debtor is valid.

against all his creditors existing or subsequent who have not acquired a lien on the property affected by such contract." Comp. Laws, § 7217.

"A debtor may pay one creditor in preference to another, or may give to one creditor security for the payment of his demand in preference to another." § 7218.

"In all cases the question of fraud is one of fact and not of law." § 7223.

The statute permits the making of a chattel mortgage and declares that it shall be void against creditors of the mortgagor, unless the original or an authenticated copy is filed in the office of the register of deeds of the county where the property mortgaged is situated. § 6758.

"The filing operates as notice to subsequent purchasers and creditors." § 6759.

On January 14, 1918, the mortgage was made in form and manner prescribed by statute, and on the same day it was duly filed in the office of the proper register of deeds. It was made by the mortgagor to his father-in-law to secure a promissory note and past due debt for \$5,751 and interest. The debt was for personal property which the plaintiff had sold to Van Dusen. The writ of attachment was duly issued on March 26, 1918, in an action then pending to recover from Van Dusen \$600. The return of the sheriff shows that under the attachment he did "levy on and seize" as the property of Van Dusen thirteen horses and a lot of other property. It shows the levy and seizure was not subject to the rights of the plaintiff. It shows a direct attack on the mortgage, and the same is further shown by the answer.

The day after the levy the plaintiff made and served on the sheriff an affidavit setting forth his claim to the property and demanded a return of the same. The sheriff consulted with the Mercantile Company, and, in accordance with their instructions, refused to return the property. There is nothing in the record to show that the mortgage was not given for a debt justly and honestly due the plaintiff. On the trial the mortgage was put in evidence, with proof showing that it was given for an honest debt; that it had not been paid, and proof showing the value of the property and that it had been levied on and seized by the sheriff. After making what is known as a good prima facie case, the plaintiff rested. The defendants then moved for a directed verdict. The motion covers over four typewritten pages and asks the

court to weigh and discredit the testimony given by the plaintiff and his witness, Van Dusen. It argues that the case presents an equitable issue and that the levy did not prevent the plaintiff from foreclosing his mortgage. It does, in effect, blow hot and cold, claiming that though there was a levy, it did not amount to anything. Manifestly the case should have been tried and determined and submitted to the jury on the issues presented by the pleadings. That was not done. The main issue presented was on the averment that the mortgage was taken with intent to hinder, delay, and defraud the creditors of Van Dusen. That question should have been submitted to the jury. It was one of fact and not of law.

The judgment is reversed, with costs, and the case remanded for a new trial.

OSCAR PETERSON and Hans Peterson, Copartners, Appellants,
v. PHIL FINNEGAN, Respondent.

(176 N. W. 734.)

Judges — power of judges sitting in other districts.

1. Judge Buttz of the then second judicial district, by written request, called Judge Cooley of the then first judicial district to preside at a special term of court, in the second judicial district, at which the case in question was tried by the plaintiffs, the defendant making no appearance. A judgment was entered for the plaintiffs. Subsequently, defendant made a motion to vacate and set aside the judgment, on the ground of inadvertence and excusable neglect, and noticed it to be heard before Judge Cooley, at Grand Forks, in the first judicial district. *Held*, in these circumstances, that Judge Cooley had jurisdiction to hear and determine such motion.

Judgment — vacation of judgment on grounds of inadvertence and excusable neglect of counsel.

2. The court did not abuse its discretion in ordering the vacation of the judgment.

Opinion filed February 9, 1920.

Appeal from an order vacating a judgment.

Order affirmed.

Paul Campbell, for appellants.

Cuthbert & Smythe and D. J. McLennan, for respondent.

The trial court was without jurisdiction to amend an order appealed from after the statutory period for appeal had expired. *Milder v. Thompson*, 31 N. D. 147.

The discretionary power vested in courts to relieve litigants from default should be liberally exercised in the furtherance of justice. *Bucknell v. Archer*, 29 S. D. 22, 135 N. W. 675; *Montija v. Sherer*, 5 Cal. App. 736, 91 Pac. 261; *Griswold Linseed Oil Co. v. Lee*, 1 S. D. 531, 47 N. W. 955; *Rosebud Lumber Co. v. Serr*, 22 S. D. 389, 117 N. W. 1042.

Excusable neglect means a lack of attention to the progress of the case, or failure to attend the trial, which is excused or justified by the peculiar circumstances of the case. 23 Cyc. 935, 936; *Pier v. Millerd*, 63 Wis. 33, 22 N. W. 759; *Douglas v. Badger State Mine*, 41 Wash. 266, 4 L.R.A.(N.S.) 196, 83 Pac. 178.

The court has no discretion in a case where the moving party shows himself clearly entitled to the relief. 33 Cyc. 896; *Board of Education v. Nat. Bank*, 4 Kan. App. 438, 46 Pac. 36; *Cavanaugh v. Toledo, W. & W. R. Co.* 49 Ind. 149; *Lawler v. Washford-Burmister Co.* 5 Ariz. 94, 46 Pac. 72; *Hawthorne v. Oliver*, 32 Or. 57, 67 Am. St. Rep. 518, 51 Pac. 440; *Cloud v. Markle*, 186 Pac. 614.

GRACE, J. This is an appeal from an order vacating a judgment entered in favor of plaintiffs.

The action was commenced in September, 1917, to recover the sum of \$85, which plaintiffs claimed to be due them for drilling a well for the defendant upon his farm, the northeast quarter of Section 14, Township 159, Range 72, Rolette county, North Dakota; and, further, to foreclose a certain mechanic's lien filed against the premises to secure said sum.

The defendant interposed an answer, which placed in issue every material allegation of the complaint. The answer sets forth a warranty, to the effect that the plaintiffs agreed to construct a well for

defendant, which would supply a sufficient amount of water for the stock owned by the defendant, which they wholly failed to do.

The defendant agreed to pay for the materials necessary to build the curb of the well, and to pay the plaintiffs the sum of \$1 per foot, in case they procured a well for defendant, which would supply the quantity of water agreed upon; and that, if plaintiffs failed to supply the necessary and sufficient water, or, in the event that no water was obtained, the defendant was to pay the sum of 25 cents per foot for each foot, in depth, of the well.

There is other matter in defense set up in the answer, including a general denial. The answer also shows that defendant offered to pay the plaintiffs at the rate of 25 cents per foot for each foot, in depth, of the well, which amounted to \$21.25, by offering a money judgment only in that amount, together with the costs of the action up to the time of the service of the amended answer.

No demurrer was interposed to the answer, and for the purpose of considering the merits of the order vacating the judgment, such answer must be taken as stating a good defense.

The cause was upon the calendar of the district court of Rolette county, for the regular June, 1918, term. At the time of the inception of the case, one D. J. McClennan of Rolette, Rolette county, North Dakota, was acting as defendant's attorney, and interposed an answer in said cause for him.

Just prior to the June, 1918, term of the district court, the defendant retained one F. T. Cuthbert of the law firm of Cuthbert & Smythe of Devils Lake, to try the case for him, and to take charge of the litigation.

On about the 13th of June, 1918, Mr. Cuthbert prepared and served an amended answer upon Paul Campbell, the attorney for plaintiffs, and notified him that he would ask leave of the court, on the opening day of the June, 1918, term, for permission to file the same.

We think, from what appears in the record, the case was properly on the calendar for trial at that term. It also appears that plaintiffs' attorney was endeavoring to get the case tried at that time, and asked the court to set the trial for a day certain. This the court did not do; it was not obliged to do so, and the case was not called for trial at that term. It seems that term of court was adjourned, and the court, upon the consent of defendant's counsel, continued the case.

It appears that a special term of the district court of Rolette county was ordered by Judge Buttz, which convened sometime in February, 1919. This case was set for trial on the 24th of that month. Notices of this term were sent to McClennan and Cuthbert & Smythe, defendant's attorneys, and Paul Campbell, attorney for the plaintiffs.

It appears that Mr. Cuthbert, who was acting with McClennan for the defendant, had, since the prior term of court, discontinued business in the state of North Dakota, and had removed to the city of Duluth, Minnesota, apparently leaving some of his legal business in care of his partner, Mr. Smythe.

It appears that Mr. Smythe was not familiar with Mr. Cuthbert's connection with this case, and that, while he had two other cases in the February term of court, he had arranged for a continuance of them. He claims not to have known of this particular case, and that, by inadvertence, it was entirely overlooked. Neither Mr. Cuthbert nor Mr. Smythe attended the term.

It does not appear, however, that McClennan had severed his connection from the case, either voluntarily or by the wish of his client, though we would infer from the record that it was the desire of the defendant that Mr. Cuthbert should try the case.

There is nothing to show but what Mr. McClennan was present at the term of court in question, though it does appear he received notice that the case was on for trial at that term. It appears that Judge Buttz, for some reason, was temporarily called away from his duties. In writing, he requested Charles F. Cooley, judge of the then first judicial district, to sit in his place and preside at the term then in session; and Judge Cooley did so.

This case was called for trial, and plaintiffs produced their witnesses; their testimony was taken in the regular and ordinary way, and plaintiffs had judgment, as prayed for in their complaint, and as shown by the judgment.

Later, the defendant made a motion to vacate the judgment. It was returnable before Charles F. Cooley, judge, at Grand Forks, North Dakota. It was supported by the affidavit of Mr. Smythe, C. W. Buttz, presiding judge for the then second judicial district, the affidavit of D. J. McClennan, and F. T. Cuthbert. It was also made upon all the records and files of the case. The affidavits supporting it did

not set forth the facts upon which the defense was really based, but merely claimed that the defendant had a meritorious defense, and, in addition to this, set forth the circumstances showing inadvertence, which they claimed to be the cause of their failure to attend at the trial.

This is not the ordinary case of default, where judgment is taken without the defendant having made an appearance, and without the interposition of an answer, but one where the issues were joined. The matter comprising the defense had been set up in the answer, and, for the purposes of this appeal, must be considered as constituting a good defense. In such case, it is not necessary to set forth in the affidavit the merits of the defense, but only such facts as are relied upon to excuse the inadvertence or mistake relied upon to excuse the default.

In a case where there is no appearance and no answer, and judgment is taken by default, a party applying for vacation of the judgment must make an affidavit of merits, and tender an answer. In this case, the answer had been served and disclosed a meritorious defense; clearly, the only thing necessary to set up in the affidavit was as we have above stated.

It is also claimed that Judge Cooley had no jurisdiction to hear and decide a motion to vacate the judgment, while within his own district, where he maintained the chambers of his court, and having completed the term for Judge Buttz in Rolette county, which included the trial of this case, and the entry of judgment therein.

Under the written request, Judge Cooley did have jurisdiction to try the case in question, and did dispose of it, in the manner above stated; and it would seem he would have jurisdiction, under § 7353, Comp. Laws 1913, of a motion, subsequently made to vacate the judgment.

It appears from the record that Judge Buttz was disqualified to hear the action to vacate the judgment, for he had made an affidavit, in support of defendant's motion to vacate it.

Hence, under § 7353 or § 7941, Comp. Laws 1913, it would appear Judge Cooley had jurisdiction to hear and determine the motion for vacation of the judgment.

It may be, that, if Judge Buttz had not been disqualified to hear the motion to vacate the judgment, and the motion had been made before

him, and he had assumed jurisdiction of the matter, perhaps, in that case, the jurisdiction of Judge Cooley in the matter would have been at an end. This is a question, however, which is not before us, and one which we do not decide.

The matters involved in this case transpired prior to the time when the new judiciary act became effective; this decision considers the question of jurisdiction in relation to judicial districts, and the power and authority of the judges thereof, as they existed prior to the time when such act became effective.

The order of October 6, 1919, needs no extended consideration. It is not necessary to decide whether the court had jurisdiction to make that order. The court did have jurisdiction to make the order appealed from, and that is the only issue in this appeal.

We are of the opinion that there was a sufficient showing of inadvertence and excusable neglect on the part of defendant, upon which the court was justified in vacating the judgment, and, in doing so, there was no abuse of its discretion. The terms imposed as a condition for the vacation of the judgment, were, no doubt, such as the trial court thought just, and we find no reason in the record why any change in them should be ordered.

The order appealed from is affirmed.

The respondents are entitled to statutory costs and disbursements on appeal.

CHRISTIANSON, Ch. J., and ROBINSON and BIEDZELL, JJ., concur.

BRONSON, J., concurs in the result.

CHRISTIANSON, Ch. J. (concurring). I concur in the opinion prepared by Mr. Justice Grace.

I believe that Judge Cooley had authority to hear and determine the application to vacate the default. See § 7941, Comp. Laws 1913; Gould v. Duluth & D. Elevator Co. 3 N. D. 96, 54 N. W. 316; Bruegger v. Cartier, 20 N. D. 72, 126 N. W. 491.

I also believe that there was a sufficient showing to justify the trial court in vacating the default. In fact, a stronger case of excusable neglect was presented in this case than that shown in Westbrook v.

Rice, 28 N. D. 324, 148 N. W. 827, wherein this court reversed the trial court's order refusing to vacate a default judgment.

Considerable argument has been advanced pro and con as to whether there was a sufficient affidavit of merits in this case. The respondent has called attention to the fact that there had been duly interposed an answer setting forth a good defense, which answer was duly verified, by attorney, in form and manner as required by law; that the case was at issue upon the complaint and such answer. Attention is further called to the affidavit of respondent's counsel, submitted in support of the application to vacate the default, wherein it is stated that such attorney "knows that the said defendant has a good defense to said action, in his opinion." It becomes unnecessary to determine whether there was or was not a sufficient affidavit of merits. In the opinion prepared by Mr. Justice Grace, it is held that an affidavit of merits is not required in a case where a verified answer setting forth a good defense has been interposed prior to the default. This holding is in harmony with, and directly supported by, the decision of this court in *Harris v. Hessin*, 32 N. D. 25, 151 N. W. 41. I believe that the rule announced in *Harris v. Hessin*, should be adhered to regardless of what views I or other members of the court might have entertained if the question had been an original one in this jurisdiction. For it is important for the proper and expeditious conduct of judicial business that the rules of practice and procedure should be stable; and the rule of stare decisis is especially applicable to decisions on matters of practice and procedure. *Horton v. Wright*, B. & S. Co. 43 N. D. 114, 174 N. W. 67.

W. W. PATTEE, Respondent, v. WALTER PRALL, Appellant.

(176 N. W. 659.)

Evidence — parol evidence admissible to ascertain true consideration.

1. In a contract involving the sale of real estate and of bank stock, parol testimony is admissible for the purpose of ascertaining the true consideration.

Contracts — where parties differed upon the true consideration it was not error to submit sufficiency of plaintiff's tender to jury.

2. In an action to recover moneys paid or due under a rescinded contract,

where the parties differed upon the true consideration of such contract, the trial court did not err in submitting to the jury the sufficiency of plaintiff's tender of performance or his justification in refusing to perform.

Opinion filed February 10, 1920.

Action in District Court, Eddy County, *Buttz, J.*, to recover money paid or due upon a rescinded contract.

From a judgment in favor of the plaintiff, the defendant has appealed.

Affirmed.

James A. Manley and *Edward P. Kelly*, for appellant.

The testimony was evidenced by writing and to permit the supposed agreement to be proven by parol would be to vary, contradict and annul the written agreement by a parol, contemporaneous agreement. This the law will not tolerate. *National German American Bank v. Lang*, 2 N. D. 11; *Thompson v. McKee*, 5 Dak. 172, 37 N. W. 367; *Piano Mfg. Co. v. Root*, 3 N. D. 165; *Wm. Deering & Co. v. Russell*, 5 N. D. 319.

To permit this stipulation to be proven by parol would be to permit an additional term or be granted upon a written contract which would effectually change the contract expressed in the writing as if the stipulation were in direct contradiction of its terms. *Jones & Son v. Great Northern R. Co.* 12 N. D. 336; *First Nat. Bank v. Prior*, 10 N. D. 146.

An offer of performance is of no effect if the person making it is not able and willing to perform according to the offer. *Laws 1913, § 5810.*

W. J. Lorshbough and *N. J. Bothne*, for respondent.

A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates. *N. D. Comp. Laws, § 5907.*

If the terms of a promise are in any respect ambiguous or uncertain it must be interpreted in the sense in which the promisor believed at the time of making it that the promisee understood it. *N. D. Comp. Laws, § 5909.*

Whenever the terms of a contract are susceptible of more than one interpretation, or an ambiguity arises, or the extent and object of the

contract cannot be ascertained from the language employed, parol evidence may be introduced to show what was in the minds of the parties at the time of making the contract, and to determine the object on which it was designed to operate. 10 R. C. L. p. 1065 and citations; Newman v. Kay, 68 L.R.A. 908; Quarry Co. v. Clements, 43 Am. Rep. 442; Miller v. Way (S. D.) 59 N. W. 467; Sturges v. Ry. Co. (Mich.) 131 N. W. 706; Martin Steam-Feed Cooker Co. v. Olive (Iowa) 47 N. W. 980.

Ambiguity in a contract or written instrument must be interpreted most strongly against the party who prepared it. American Surety Co. v. Pauly, 170 U. S. 144; Grace v. Insurance Co. 109 U. S. 382; 6 R. C. L. 854 and citations.

A parol contemporaneous agreement which constituted the inducing cause of a written agreement, or formed a part of the consideration therefor, is generally admissible in evidence. Erickson v. Wiper, 33 N. D. 193; Gilbert Mfg. Co. v. Bryan (N. D.) 166 N. W. 805.

Bronson, J. This is an action to recover moneys paid or due under a rescinded contract. The parties were joint owners of a platted townsite, and certain acreage adjoining, in Brantford, North Dakota. The defendant owned certain bank stock of the Security State Bank, of which he was president. The Farmers State Bank, a competing bank, desired to secure the stock in the Security State Bank. It had negotiations with the plaintiff concerning the matter.

In December, 1917, the plaintiff and the defendants made a written contract wherein the defendant agreed to sell and convey to the plaintiff his one-half interest in the remaining lots of the townsite and in the acreage adjoining; he also agreed to sell to the plaintiff 100 shares of his bank stock, at book value on January 1, 1918. The consideration stated for the one-half interest in the lots was \$50 per lot for the 25 ft. lots and \$25 per lot for the 50 ft. lots; for the acreage \$1,400; for the good will of the banking business \$1,000; a payment down of \$5,000 in cash, was stipulated. This amount was paid by the plaintiff after some changes were made in the written contract, such as changing the amount of the cash payment from \$10,000 to \$5,000; the consideration of the acreage from \$1,500 to \$1,400; the time of occupancy of defendant's bank building from July 1, 1918, to May 1, 1918;

and a particular stipulation, written in the contract, that the defendant will take up all loans, and will be permitted to take up any certificates of deposits he may have in his bank. The plaintiff about the same time, made a similar contract with the Farmers State Bank for the transfer by him, to such bank of the bank stock of the defendant; the townsite lots and the acreage involved for a similar consideration. The plaintiff borrowed the \$5,000, so paid, upon his note from this bank.

On January 2, 1918, the plaintiff, with an accountant, appeared at defendant's bank for the purpose of making settlement, pursuant to the contract. In considering the amount to be paid, a dispute arose upon the provisions of the contract, providing for the payment of the one-half interest of the defendant in the townsite lots, and acreage at so much per lots, and at a stated amount for the acreage. The defendant immediately stated that the amount as stated in the contract was the amount that he was to receive; the plaintiff maintained that the amount stated was the total lot or acreage value and should be divided by two; that this would then represent defendant's undivided one-half interest therein. Apparently, by reason of this difference between the parties, this law suit has arisen. The defendant insisted that he was entitled to receive what his contract stated. The plaintiff withdrew; he prepared, in writing, a tender of performance, and served the same that day upon the defendant. In addition to these matters, the parties owned, jointly, a house and lot in Nebraska, three lots in the townsite mentioned occupied by plaintiff's buildings, and an interest in three contracts of sale for lots.

Prior to this time and after making the written contract, the defendant had conveyed his undivided interest in these three lots to the plaintiff; the defendant had also inserted his name as grantee in a blank deed possessed to the Nebraska property; the plaintiff had assigned his interest to the defendant in the lot contracts. The agreement concerning these properties rested in parol. The plaintiff maintaining that these agreements of transfer of such properties was orally made outside of the written agreement, upon the understanding that the plaintiff would receive the difference between the value of the properties conveyed and received by him. The defendant maintains that the independent oral agreement was made for the transfer and exchange

of such property without any additional consideration. The value of the property, as to the interest of the defendant, received by the plaintiff, was \$75; the value of the property received by the defendant, as to the interest of the plaintiff, was, for the Nebraska property \$600; for the lot contracts \$150. The plaintiff maintains, in his testimony, that the defendant filled his name in as grantee without the knowledge, consent, or authorization of the plaintiff. The parties subsequently did not come to any understanding or agreement for the performance of their contracts. The defendant retained the \$5,000, his bank stock, and the transfers received by him; he maintained the right to withhold this \$5,000 under the contract for failure of the plaintiff to perform.

This action, accordingly, was brought to recover from the plaintiff the sum of \$5,000 and the amount of his interest in the Nebraska property, and the lot contracts, less the value of defendant's interest received in the three lots conveyed by him to the plaintiff. The action was tried to a jury. A verdict was returned for the plaintiff for \$5,000, the consideration paid, \$600 for the Nebraska property, and \$150 for the contracts, less \$75, together with interest thereupon. From the judgment entered upon this verdict, the defendant has appealed.

The defendant specifies error principally upon the grounds that the trial court erred in permitting oral testimony to be introduced to explain the written agreement concerning the amount to be paid the plaintiff for the lots and acreage, and in submitting the case to the jury, in opposition to his motions, concerning such testimony, and concerning the failure of the evidence to show a proper tender of performance or offer of performance on the part of the plaintiff.

At the close of the case the parties stipulated the book value of the bank stock. The amount of the verdict concerning items other than the \$5,000 item is not controverted. The specifications concern alone, the \$5,000 item as awarded through the verdict of the jury.

The trial court upon fair instructions submitted to the jury the question of fact involved. The jury by its verdict found adversely to the contentions of the defendant.

It is considered immaterial in this case, whether the contract is to be deemed to express on its face, an agreement for a total lot or acreage value payable to the defendant, or an amount equal to one half thereof, or whether it is ambiguous in that regard.

It is evident that the main issue in this case was the question of the true consideration due the defendant concerning these town lots and acreage. It is well settled in this state, and is fundamental, that parol evidence is admissible for the purpose of showing the true consideration of a contract even though it be different or other than that expressed in the contract. See *First State Bank v. Kelly*, 30 N. D. 84, 93, 152 N. W. 125, Ann. Cas. 1917D, 1044; *Beiseker v. Svendsgaard*, 28 N. D. 366, 370, 149 N. W. 352; *Erickson v. Wiper*, 33 N. D. 193, 207, 157 N. W. 592; see 17 Cyc. 651, 655; see also *Alsterberg v. Bennett*, 14 N. D. 596, 599, 106 N. W. 49. The parol testimony submitted was admissible for the purposes of the rule quoted. There was evidence in the record sufficient to justify the verdict of the jury, that the true consideration was as plaintiff contended; in fact, upon the preliminary agreements, the defendant in money, asked for an amount representative of the amount in accordance with the plaintiff's contentions. Also upon the trial the defendant admitted that if such amount had been tendered he would have received it.

Upon the question of performance, the trial court properly submitted to the jury the issues as to whether the plaintiff had made a proper offer or tender of performance, or was justified, in view of the acts of the defendant, in being excused from making any offer of performance. Comp. Laws 1913, § 5821. The judgment of the trial court is in all things affirmed.

PAUL J. KALMAN and George E. Routh, Jr., Co-partners Doing Business under the Firm Name and Style of Paul J. Kalman Company, Appellants, v. D. A. DINNIE, Respondent.

(176 N. W. 656.)

Evidence — secondary evidence of letter when admitted.

Where an original letter written by the plaintiffs to the defendant had been in the possession of the defendant, and preliminary proof of its loss is made through a search of the possession of its custodian, no notice of demand upon the adverse party to produce such letter is requisite in order to admit in evidence secondary evidence of its contents.

Opinion filed February 13, 1920.

Action in District Court, Ward County, *Leighton*, J., upon an account and counterclaim for damages. From a judgment in favor of the defendant, and an order denying a new trial, the plaintiffs have appealed.

Affirmed.

Greenleaf & Woledge, for appellants.

Bradford & Nash, and *E. T. Burke* on oral argument, for respondent.

Assignments of error not briefed nor argued are deemed abandoned and will not be considered. *Nichols & S. Co. v. Marshall*, 132 N. W. 791.

No notice or demand was necessary for the introduction of secondary evidence when the pleadings disclose specifically the nature of defendant's proof. *Owens v. Bemis*, 22 N. D. 163; 2 *Wigmore*, Ev. §§ 1203, 1205, 1462.

If the original cannot be produced, parol evidence of its contents may be given. *Doe v. Ross*, 7 N. & W. 2; *Greenl. Ev.* § 84, note.

Jurors' affidavits are inadmissible to explain the verdict. *People v. Hogner*, 1 Wend. 297; *Wright v. Telephone Co.* 20 Iowa, 195; *Thomp. Trials*, p. 1902.

It is not admissible to show by the oath of a juror that he did not agree to the verdict as rendered. *Thomas v. Jones*, 28 Gratt. 383; 2 *Thomp. Trials*, 2d ed. 1904.

In states which have adopted the code system of pleading accord and satisfaction must in all cases be pleaded specially. *Sweet v. Burdett*, 40 Cal. 97; *Coles v. Souleby*, 21 Cal. 47; *Berdell v. Bissell*, 6 Colo. 162; *Barnum v. Greene*, 57 Pac. 757; *Combs v. Smith*, 78 Mo. 32; *Jacobs v. Day*, 5 Misc. 410, 25 N. Y. Supp. 765.

Accord and satisfaction is new matter. *Coles v. Souleby*, supra.

BRONSON, J. This is an action to recover the balance due upon a contract for materials furnished in the construction of a Normal School. The defendant answered by alleging payment and by a counterclaim for damages through the failure of the plaintiff company to furnish, at a specified time mentioned in a contract, certain reinforcing steel requisite in the construction of the Parker Hotel at Minot. In the trial court, the jury returned a verdict for \$303.26, in favor of the defendant. The plaintiff company has appealed from the judgment

entered thereon, and from an order denying a new trial. At the trial, the defendant, to establish the period of delay occasioned by the failure of the company to furnish the steel at the time specified, introduced secondary evidence of the contents of a letter received by the defendant from the company, through his oral testimony, after preliminary proof of its loss. No notice to produce such letter was made upon the company. Objection was made by the company to the admission of such secondary evidence upon the ground that no such notice was given and that the company was surprised. The trial court admitted the evidence. Thereupon, the company moved for a continuance of the case over the term for purposes of securing rebutting evidence. This motion was denied. The principal contention of the appellant company is that the trial court erred in admitting such secondary evidence and in denying such motion. The company admits that the motion was properly denied, if the evidence was admissible.

No notice to produce was necessary. Such notice is essential only when the original instrument, sought to be proved by secondary evidence, is or may be presumed to be in the possession of the adverse party. 17 Cyc. 558. See *Nichols v. Charlebois*, 10 N. D. 446, 449, 88 N. W. 80. The original letter had been in the possession of the defendant. The failure to produce this letter, or its loss, would not be established, for the purpose of admitting secondary evidence of its contents, by demand upon the company, or by a search of effects, but through a search of the possession of its custodian. 17 Cyc. 553. The company further specify that the evidence discloses a complete settlement between the parties and in fact no delay in the delivery of the materials, concerning the Parker Hotel. These were questions of fact, in any event, for the jury. The court properly instructed the jury concerning the allowance of the company's admitted claim. The judgment is affirmed.

STATE OF NORTH DAKOTA EX REL. CARL R. KOZITZKY,
State Auditor, Appellant, v. J. R. WATERS, Manager of the
Bank of North Dakota of the State of North Dakota, and F. W.
Cathro, Director General of the Bank of North Dakota of the
State of North Dakota, Respondents.

(176 N. W. 913.)

Banks and banking — examination of Bank of North Dakota not a part of the duties of the state auditor.

The examination of the Bank of North Dakota is not a part of the duties of the state auditor.

Subdivision 14 of § 132, Compiled Laws of 1913, which makes it the duty of the state auditor "to inspect, in his discretion, the books of any person charged with the receipt, safeguarding, or disbursement of public moneys," and § 135 of the Compiled Laws of 1913, which gives the auditor access "to all state offices during the business hours for the purpose of inspecting such books, papers, and accounts therein as may concern his duties," are construed in conjunction with chapter 147 of the Session Laws of 1919, which provides for the creation of the Bank of North Dakota, and it is held:

Opinion filed February 18, 1920.

Appeal from an order of the District Court of Burleigh County.
Nussle, J.

Order affirmed.

William Langer, Attorney General, and *L. E. Packard* and *Albert E. Sheets*, Assistant Attorneys General, for appellant.

"To inspect is to examine; to view closely and critically; especially in order to ascertain quality and condition, to detect error, etc." *People v. Campagnilgen Transit Alantigue*, 107 U. S. 57, 27 L. ed. 385; *Peterson v. R. Am. Comp. Co.* 111 N. Y. Supp. 329; 2 Words & Phrases, 2d series, 1104.

The Bank of North Dakota is a part of the state government. *Bank of U. S. v. Planter's Bank*, 9 Wheat. 904; *Bank of Kentucky v. Wister*, 25 Pet. 217; *Briscoe v. Bank of Kentucky*, 11 Pet. 310; *Craig v. State*, 4 Pet. 310; *Curran v. State*, 14 How. 305; *Darrington v. State Bank*, 13 How. 12.

W. A. Anderson and L. A. Simpson, for respondents.

The history and facts and circumstances surrounding the legislation in question is proper to be considered and construed. *Mushel v. Schulz* (Minn.) 166 N. W. 179.

BIRDZELL, J. This is a proceeding to compel the defendants to admit the plaintiff into the Bank of North Dakota for the purpose of conducting an examination. The trial court refused to issue the writ prayed for and the appeal is from the order made.

The plaintiff, who is the state auditor, contends that the examination of this bank constitutes a part of his official duties and relies upon subdivision 14 of § 132 of the Political Code which makes it the duty of the state auditor "to inspect, in his discretion, the books of any person charged with the receipt, safeguarding, or disbursement of public moneys," and upon § 135, which provides that the auditor shall have access to "all state offices during the business hours for the purpose of inspecting such books, papers, and accounts therein as may concern his duties." Chapter 147 of the Session Laws of 1919, which provides for the creation of the Bank of North Dakota, is cited and relied upon as showing the character of that institution. From the various provisions of this chapter it is contended that the institution is so far public in its character as to be a part of the government of the state, rather than a trading company, and that, therefore, it is subject to the same measure of inspection by the state auditor as are state officers referred to in § 135, Comp. Laws 1913.

The foregoing contentions are met by the respondents with the statement that it is immaterial whether the Bank of North Dakota be considered a trading company or a public institution; that it is nevertheless a bank performing certain of the ordinary functions of an ordinary bank, such as the receipt of deposits, etc., and consequently subject to the same duty of regarding the confidence reposed by depositors and customers as are privately owned banks. It is argued from this that its records are not in the full sense public. It is pointed out that the act authorizing the creation of the bank (§ 23) specifically provides for examinations by the state examiner, the results of which are to be reported to the industrial commission, the legislative assembly and the state banking board.

The question before us is wholly one of ascertaining legislative intention. If the legislature intended that the state auditor should perform the same duties with respect to the inspection or examination of the Bank of North Dakota as have long heretofore existed with respect to the state officers or persons charged with the receipt, safeguarding, or disbursement of public moneys, it is obvious that its intention must be given effect even though it be also provided that the Bank of North Dakota shall be subject to examination by the public examiner. There are several elements, however, in the existing legislation touching the question in hand which point persuasively to the conclusion that such was not the legislative intention. First, public moneys have heretofore been deposited in depository banks and it has not been considered a part of the duties of the auditor to inspect the books of the depository banks. In fact, it is conceded by the appellant that that has never been any part of his duties. As a depository of public funds the Bank of North Dakota merely succeeds, under the law, to the functions of the privately owned depository banks. In reposing the function in the Bank of North Dakota there is no basis for presuming an intention to enlarge the scope of the duties of the auditor. Second, the fact that special provision is made for examination by the public examiner and for reporting the same not only to the industrial commission but to the banking board and to the legislature, is a strong indication that the legislature intended to exhaust the subject of examination with reference to this institution. To these may be added another consideration which appeals with some force. The bank, while publicly owned, does have certain powers which have heretofore been exercised and enjoyed exclusively by privately owned banks. Examination of privately owned banks possessing these powers is, of course, an exercise of police power for the protection of patrons and the public. Otherwise, it might constitute an unwarranted search. Such examinations have been in aid of proper regulation. There is nothing in the statute with reference to the duties of the auditor that connects that office with the regulatory power. He is given no authority to act upon any condition that might be disclosed by his examination.

Aside from the foregoing, there is, in our opinion, little basis for argument one way or the other. A careful examination of the statutes cited leads us to the conclusion that the examination of the Bank

of North Dakota is no part of the duties of the state auditor. The order appealed from is affirmed.

CHRISTIANSON, Ch. J., and BRONSON and GRACE, JJ., concur.

ROBINSON, J. I think the Bank of North Dakota is a material department of the state treasury and as such it is subject to examination by the state auditor.

CHRISTIANSON, Ch. J. (concurring). The sole question presented in this case is the right of the state auditor to inspect the books, papers, and accounts of the Bank of North Dakota. In former cases I have asserted that the constitutional amendment under which the Bank of North Dakota is purported to have been created was not in fact adopted. While these views remain unchanged, the fact also remains that the legislature acting under the alleged constitutional amendment has enacted a law creating the Bank of North Dakota; that such law has been put into operation, and that the present controversy has arisen thereunder.

The state auditor has such powers and is required to perform such duties as are prescribed by law. N. D. Const. § 83. The Bank of North Dakota is a creature of the legislature. The manner of inspection of books of public officers and departments, as well as the banks and other financial institutions in the state is also a matter of legislative control. Hence, all questions in any manner involved are bottomed upon legislative enactments, and the ultimate question is: Did the legislature intend that the state auditor should be empowered to inspect the books, papers, and accounts of the Bank of North Dakota? I believe that this question must be answered in the negative for the reasons stated in the opinion prepared by Mr. Justice Birdzell. I therefore concur in that opinion.

MARIE FYLLING, Formerly Marie Mork, Respondent, v. OLE MORK, Appellant.

(176 N. W. 914.)

Judgment — vacation of judgment — when granted.

In an application to vacate a judgment, the district court entered an order, denying it. *Held*, for the reasons stated in the opinion, that the denial of such application constituted, in this case, an abuse of discretion.

¹ Opinion filed March 1, 1920.

Appeal from the District Court of Bottineau County, North Dakota,
Honorable A. G. Burr, Judge.

Order reversed.

Geo. F. Shafer, for appellant.

As a general rule the court will relieve a party from the effects of a judgment entered against him by default, where it appears that he has a good and sufficient meritorious defense; where there is a reasonable excuse for the delay occasioning the default; where the party acts diligently and moves promptly for relief upon receiving notice of the entry of judgment. *Northern Commercial Co. v. Goldman*, 37 N. D. 542; *Citizens Nat. Bank v. Branden*, 19 N. D. 489, 27 L.R.A.(N.S.) 858; *Westrook v. Rice*, 28 N. D. 328; *Racine-Sattley Mfg. Co. v. Pavlicek*, 21 N. D. 229.

A person who suffers a default judgment to be entered against him through an honest mistake of law, resulting in his being misled, is not any less entitled to equitable relief therefrom than he would be had the neglect been due to a mistake of fact. 23 Cyc. 932; 15 R. C. L. 160; *Baxter v. Chute*, 53 N. W. 379; *Braseth v. Bottineau County*, 13 N. D. 344; *Lobe v. Bartaschawich*, 37 N. D. 572.

W. J. Cooper, for respondent.

Mistake, to be available as an excuse, must be one of fact and not of law. 23 Cyc. 930, 932.

The vacating of a judgment entered on default rests in the sound judicial discretion of the trial court and the appellate court will not reverse the decision of this trial court in the absence of abuse of that discretion. *Racine-Sattley Mfg. Co. v. Pavlicek*, 21 N. D. 222.

GRACE, J. This is an appeal from an order of the district court of Bottineau county, denying defendant's application for vacating of a certain default judgment, taken against him, by plaintiff.

The material facts, as disclosed by the affidavit, in support of the application to vacate the judgment, are substantially as follows:

The plaintiff, at the time of the commencement of this action, was the wife of Peter Fylling, to whom she was married, on the 29th day of July, 1915. The defendant was a witness to the marriage ceremony.

In 1907, the defendant immigrated to this country, from Norway. In the years of 1914 and 1915, he was a resident of Bottineau county. Between the 1st day of April, 1914, and the 1st day of June of that year, he worked for plaintiff's father, Sofus Mork, upon his farm. During that time, plaintiff was unmarried, and lived at her father's home.

Shortly after the marriage, plaintiff and her husband moved to a farm near Landa, in Bottineau county, where they have since resided.

About January 1, 1916, the defendant moved to McKenzie county, where he has since resided, upon a government homestead, which is near the residence of Sofus Mork, by whom the defendant is, considerable of the time, employed.

It is claimed by plaintiff, that on or about the 1st day of January, 1914, at Bottineau county, the defendant made an indecent assault upon plaintiff, and debauched and carnally knew her. She was at that time sixteen years of age. That on the 15th day of July, 1915, in the same county, the defendant made another similar indecent assault upon her.

She claimed thereby to recover damages, in the sum of \$1,000. She had judgment, by default, for \$521.45.

The defendant is thirty-three years of age, and is the brother of Sofus Mork, and the uncle of plaintiff.

It appears the plaintiff never disclosed to her father, or any of her people, anything regarding the alleged indecent assault, nor did she disclose it to anyone until about the 1st day of January, 1919, when it was disclosed to Peter Fylling, if his statements, with reference thereto, in his counteraffidavit, are proper to be considered in this case. This was approximately five years after the alleged commission of the first assault.

It seems that sometime prior to February 4, 1919, Peter Fylling had written the defendant a letter, demanding money from the defendant. It seems defendant had also, at about that time, received a letter from the plaintiff, and, in referring to her letter, he said: "The last verse that was written by Marie, herself, is the most thoughtless accusation that yet has been on paper."

Defendant answered Fylling's letter on February 4th, and the tenor of the answer is a refusal to comply with the demands of plaintiff.

It appears that the plaintiff then placed the matter in the hands of W. J. Cooper, an attorney at law, at Westhope, North Dakota. He wrote the defendant a letter on January 13, 1919, notifying the defendant he had been retained by plaintiff, to represent her in her claim against defendant, for damages for the alleged unlawful assaults. He also called the attention of the defendant to the fact that "an action of this kind is most unfortunate for both parties concerned, and at my suggestion we are giving you an opportunity to adjust the matter out of court.

"I am inclosing you a copy of the papers, so that you may be advised of the action we shall bring in case of a failure to agree on a settlement of the merits. You will understand that the mailing of this paper is not a commencement of an action, but that it will be necessary to have the sheriff or some other party serve the papers upon you.

"I will be glad to wait a short time for your proposition before placing the papers in the officer's hands, for service."

It further appears, from the letter, that in order to save expense and the embarrassment, a settlement for somewhat less would be made, if made out of court.

About two weeks later, plaintiff's attorney wrote another letter, stating, in effect, that they could not permit the matter to drag, and that if they did not hear from him within ten days, they would place the papers in the hands of the sheriff for further proceedings.

On February 8th, Cooper wrote another letter to defendant, stating to him that Mr. Fylling had called upon him, and reported that the defendant had written him, that he was claiming to be innocent of the whole affair. Then followed another threat on the part of the attorney, that, if he did not hear from him, with some kind of a proposition of settlement, he would forward the papers to the sheriff for service, again giving defendant ten days' time to consider the matter.

On February 17th, the defendant wrote Cooper to the effect that he had received his letter, and would let him know that he was not guilty, and did not want to hear any more about the matter.

To this letter Cooper replied on the 20th, stating that he was sending the papers to the sheriff for service.

The next letter Cooper claims to have written the defendant was on July 2d, when he gave notice that judgment was rendered against defendant, for \$500 and costs. Defendant denies receiving this letter.

The defendant was served with summons and complaint, in April, 1919. He makes affidavit, in substance, as follows: That about a week after receiving those papers, he accidentally permitted them to become rain soaked in a storm which occurred about May 1st, to which he was exposed; that he had these papers in his hip pocket, and that, as a result of such wetting, they were damaged and mutilated to such an extent, that they were unintelligible; that prior to that time he had not read them, except parts of the complaint; that he did not understand them, or that they required any formal answering by him, or that it was necessary for him to show them to a lawyer; that he understood and believed that such papers constituted only a demand on him, for money, which he could ignore the same as he had letters and demands from the plaintiff's attorney; that he understood and believed no judgment, for money, could be entered against him, without the charges made in the complaint being proved in open court, in his presence; that he had never seen suit papers before; that he believed he would receive notice of the time and place of trial, and having not received the same, understood that the matter had been dropped by the plaintiff, and that he gave it no further thought, and did not consider it seriously until the sheriff served a notice of levy on his land, on about the 9th day of August, 1919, which he claimed was the first notice he had of any judgment having been taken against him; that he immediately consulted George F. Shafer, an attorney at law, of Watford city, North Dakota, and detailed, to him, a full and complete true statement of all the facts and circumstances surrounding the transaction, who then advised and informed him, that he had a good, legal, and meritorious defense to the alleged cause of action. And defendant's affidavit further shows, that he never attended school in the United States, is not very well versed in the English language, reads it with great difficulty, and

does not understand legal terms, and did not understand the serious nature of the action until so advised by his attorney, and also states that the judgment was entered against him through mistake and excusable neglect.

The defendant, with his application and affidavit, to vacate the judgment, tendered a good and sufficient answer, in the form of a general denial of the allegations of the complaint.

The only error assigned is that of the trial court, in its order of September 23, 1919, denying the motion of defendant for the vacation of the judgment.

The question presented in this case is: Did the trial court abuse its discretion in refusing to vacate the default judgment? We think it did. We think the showing was clear that the default judgment was taken by mistake and excusable neglect of the defendant. While he, to some extent, understood the English language, it is clear that he had not a very extended knowledge of it. His letter to Fylling was written wholly in Norwegian, and his statements in his letters written in English, are interspersed, here and there, with words written in the Norwegian language, which would tend to show that he had no great knowledge of the English language.

It is also shown that he had not sufficient understanding of the English language to comprehend the meaning and legal effect of the suit papers served upon him.

We think, also, perhaps the defendant's neglect was excusable, in view of the peculiar circumstances that preceded or followed the demand by plaintiff, of defendant, for the payment to her of a sum of money as damages.

The fact that plaintiff, for about five years, said nothing to anyone in regard to an assault having been made upon her by defendant, is a circumstance which may be considered, with others which affect defendant's neglect in failing to appear and answer in the case.

It would have some tendency to support defendant's claims, that he regarded Fylling's demand on him, for money, too ridiculous to be taken seriously; that he regarded the letters, written by the attorney, as he stated, as being merely a bluff, to induce the defendant to pay over money, by threats of intention to charge him with a serious offense; that he treated the whole matter as an attempt to blackmail

him; that not being guilty of the charge, he never believed that the plaintiff would take any action in court.

If the defendant thus believed, it might be some justification and excuse for his neglect. When all of the letters are read and considered, in connection with the further fact, that at the very inception of the matter, the attorney inclosed the suit papers by mail to the defendant, there would appear to be some justification for defendant's attitude. If the purpose of inclosing the suit papers to the defendant was not to instill fear in his mind, then, what was the purpose in doing so? Certainly, such procedure is unusual and irregular. Such procedure was not intended to be the commencement of the action, as plainly appears from the letter written, with which the papers were inclosed. Such papers, and the repeated threats of procedure in court, could well be the means of confirming defendant in his theory, that the whole procedure was one to extort money from him, and be the very cause of his neglect to give timely attention to the matter, after the service, by the sheriff, of the suit papers upon him.

The attorney for the plaintiff may not have intended to deceive, mislead, or frighten defendant, but we cannot say that, on the whole record, there is no justification for defendant's neglect.

If defendant is innocent, and his claim is correct, his good name and reputation ought not to be impaired, nor his property and money taken from him, until after a fair and full trial has been had, where, within the time allowed by law, he has acted promptly, to vacate the judgment by default, which was taken against him.

In so far as his affidavit, in support of his application to vacate the judgment, deals with the merits of the case, it cannot be controverted, as to the facts therein stated, as a defense to the cause of action. It may be controverted only in such matters as relate to the cause assigned for its vacation.

Where there is a sufficient affidavit of merits, and an answer disclosing a meritorious defense, and reasonable excuse for the default, and no substantial prejudice is shown to have risen from the delay of the application to open a default judgment, we think it the better rule, that it should generally be vacated, and for these reasons, in this case, we think it was an abuse of discretion for the trial court not to vacate the judgment. *Northern Commercial Co. v. Goldman*, 37 N. D. 542,

164 N. W. 133; Racine Sattley Mfg. Co. v. Pavlicek, 21 N. D. 222, 130 N. W. 228.

The order appealed from is reversed, with permission to the defendant to interpose answer, within fifteen days after filing of the remittitur herein and, upon payment of the costs taxed in the judgment rendered, less appellant's costs and disbursements on this appeal.

ROBINSON and BRONSON, JJ., concur.

BIRDZELL, J., dissents.

CHRISTIANSON, Ch. J. (dissenting). Our statute provides that a district court may "in its *discretion* and upon such terms as may be just at any time within one year after notice thereof, relieve a party from a judgment, order or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect." Comp. Laws 1913, § 7483. Of course "the party who seeks the opening or vacation of a judgment must sustain the burden of proof, and must establish his right to the relief asked by clear and satisfactory evidence." Black, Judgm. 2d ed. § 351. Whether he has established such right is primarily a matter for the trial court to determine. In making such determination that court is vested with and exercises discretionary powers. In reviewing the determination of a trial court, this court is limited to an inquiry as to whether the ruling of the trial court is so clearly wrong that that court must have abused its discretion in arriving at the result which it did.

The majority opinion makes some reference to the alleged facts in the case. Of course, on the motion to vacate the judgment, the affidavit of merits could not be controverted. It may be noted, however, that the default judgment in this case was based upon findings of fact. We have no means of knowing what evidence was introduced, but it must be presumed that it was sufficient to sustain the findings. The trial judge who made the findings also made the order refusing to vacate the default.

"The power to vacate judgments, on motion, is confined to cases in which the ground alleged is something extraneous to the action of the court or goes only to the question of the regularity of its proceedings.

It is not intended to be used as a means for the court to review or revise its own final judgments, or to correct any errors of law into which it may have fallen." Black, Judgm. 2d ed. § 329. "A motion or proceeding to vacate or set aside a judgment cannot be sustained on any grounds which might have been pleaded in defense to the action, and could have been so pleaded with proper care and diligence." Black, Judgm. 2d ed. § 330.

Was the default judgment taken against defendant through his mistake or excusable neglect? Did he establish this so clearly that this court can say, as a matter of law, upon the record before it, that the trial court abused its discretion in refusing to vacate the judgment? Unless both of these questions can be answered in the affirmative the order appealed from should be affirmed.

It appears that plaintiff's husband wrote a letter to defendant in regard to the alleged wrong which constitutes the basis of plaintiff's action. On January 13, 1919, plaintiff's attorney wrote a letter to the defendant, wherein, after stating that he had been retained by the plaintiff, he said: "It is her wish that an action be brought against you for the damage she has sustained. An action of this kind is most unfortunate for both parties concerned and at my suggestion we are giving you an opportunity to adjust the matter out of court. I am inclosing a copy of the papers so that you may be advised of the action we shall bring in case of a failure to agree on a settlement of the matter. You will understand that these papers are not a commencement of an action but that it will be necessary to have the sheriff or some other party serve the papers upon you. I will be glad to wait a short time for your proposition before placing the papers in the officers' hands for service." This letter was sent by registered mail, and it is admitted that the letter was received by the defendant.

On January 29, 1919, plaintiff's attorney again wrote defendant as follows;

In Re Fyelling v. Mork.

It is now over two weeks since I wrote you regarding this matter but have heard nothing from you. We cannot permit this matter to drag, and unless I hear from you within ten days I will proceed to place the papers in the Sheriff's hands for further proceedings.

On February 4, 1919, defendant wrote a letter to plaintiff's husband. Reference has been made to this letter in the majority opinion. In such letter the defendant said: "I have received a letter from Mr. Cooper."

On February 8, 1919, plaintiff's attorney wrote defendant as follows:

"Mr. Fyelling called on me today and reported that you had written him and that you were claiming to be innocent of the whole affair. Now, Mr. Mork, if you can convince the jury that you are innocent, then, of course, in theory of law you are, but your protestations that you are so innocent will not prevent the matter being tried out in court. I have the papers drawn and am arranging to send them to the sheriff for service. Unless I hear from you with some kind of a proposition of settlement I will forward the papers for service on the 18th of this month. Ten days should give you sufficient time to consider the matter and make your decision known to us."

To this letter defendant replied as follows:

Mr. W. J. Cooper,
Westhope, N. D.

Arnegard, N. D. Feb. 17.

Dear Sir:

Recevd jour letter today, and will let jou know that I am not guilty, and I don't want to hear any more about this. So if Mr. Filling wants to do anything good for his wife hi hase to trye the ones there is guilty—an the jury will gett the rest of the story, if nidet (needed).

Jours very truly,

Ole Mork

Arnegard.

(The foregoing is a literal copy of the letter).

To this letter plaintiff's attorney sent the following reply, dated February 20th, 1919:

In Re Fyelling v. Mork.

Your letter of the 17th with reference to this matter has been

received. From the attitude you are taking it is evident that the only thing left to do is to send the papers to the sheriff for service. This we are doing. You are making a serious mistake but you must decide.

In his counter-affidavit defendant admits that he received these different letters.

The record shows, and the defendant admits, that the sheriff of McKenzie county (where defendant was residing) served the summons and complaint in the action upon the defendant on April 24, 1919. Judgment was entered June 4, 1919.

Plaintiff's attorney makes affidavit that on July 2, 1919, he sent the following letter to the defendant:

In Re Marie Fylling v. you.

Judgment was rendered against you in the sum of \$500 and costs, amounting in all to the sum of \$522.45 and interest at 6 per cent from June 4th. I am today ordering execution but before putting any more expense by making a levy on the land, wish to write you to inquire whether or not you wish to make a settlement. If I do not hear from you by early mail I will assume you do not intend to do anything in the matter and will proceed to sell your farm.

It is true, as stated in the majority opinion, defendant in his affidavit states that he did not receive this letter. But the affidavit of plaintiff's attorney shows that the letter was sent in an envelope with a return card on, and that it was never returned.

The majority opinion refers to the defendant's lack of knowledge of English. It is true the letter which he wrote in English to plaintiff's counsel contains some misspelled words, but as a whole the letter discloses a fair understanding of the English language. The letters which the defendant wrote to plaintiff's husband are contained in the record. These letters were written in the Norwegian language. These letters are well composed and written in a good hand, and it would appear that the defendant is a man of at least fair intelligence and some education. This was also the view of the trial court.

In denying defendant's application the trial court filed a memorandum decision, from which I quote:

"The gist of defendant's claim or appeal to the court's discretion is that though he was duly served with the 'suit papers in this action' the same were rain-soaked about a week after the service so that they could not be read and that he had only read parts of the complaint prior thereto. Further, he claims 'he did not understand the papers to be suit papers' that he believed he could ignore the same as he had done the letters from the plaintiff's attorney; that he understood and believed no judgment could be rendered against him without the charges being proved in open court in his presence and not receiving any notice of any time or place of trial he supposed the matter was dropped and gave it no further thought. He further says that the first notice he had of any judgment was when the sheriff served a notice of levy on his land on or about August 9, 1919. It is a significant fact that defendant does not furnish to this court the papers which he claims to have been so 'rain-soaked' that they are unintelligible. He does not claim they are lost or mislaid, nor does he show them to the court for us to determine whether they are intelligible. In any event, he had them at least a week and does admit he read portions of the complaint. The complaint is short, not having to exceed two folios in the body thereof, and if he had read 'parts of the complaint' he must have read most of it. He claims he reads the English 'language with great difficulty,' but he used very good English and writes well in the English language. If exhibit 'F' of plaintiff's rebutting affidavits be the production of the defendant, in his counter affidavit, he practically admits writing it and this court is inclined to believe it is, the defendant understands the English very well, and two months before the service of the papers was in correspondence with the attorney for the plaintiff. . . . It must be clear that defendant, when he was served with the summons and complaint, knew perfectly well the nature of the claim against him. He says the 'first notice that he had of any judgment having been taken against him' was when 'the sheriff served the notice of levy on his land on or about the 9th day of August, 1919.' The plaintiff shows by exhibit 'H' that defendant was notified on July 2, 1919 that judgment was rendered against him and the amount and date of the judgment—June 4th. The affidavit of Mr. Cooper shows the mailing of this letter in an envelope with a return card, and that the letter was never returned. This court is inclined to believe that

this is correct, though the defendant denies getting it. He must have received it. And when we look over the correspondence and notice the dates of the letters it is evident that defendant would have received this letter and notice about the 5th of July. The court is inclined to be somewhat suspicious of the claims of defendant, because of the inconsistency between the proposed answer and the affidavit of merits and both of these instruments are verified by the defendant himself. The complaint alleges that plaintiff was an unmarried woman at the time of the alleged assault and the defendant in his answer denies this and verifies the denial positively, yet, in his affidavit of merits he admits she was unmarried until July 29, 1915, and that he 'was one of the witnesses to such marriage ceremony.'

"The basis for the application to remove the default is 'mistake and excusable neglect.' This is not a case where the blame can be placed upon the attorney; but the neglect is the neglect of the defendant. Judgment was not entered until about six weeks after the service of the summons; the defendant for five months, at least, knew of the charge and had received two sets of the 'papers' in the case. It was not until about three weeks after the sheriff notified him of the levy on his land that he served any notice of motion to reopen the case and this was between eight and nine weeks after he had received the notice from the attorney that judgment had been entered and almost three months from the time of the entry of judgment. He cannot blame his attorney for the notice of motion is dated just four days prior to the date of the service and it would take almost that length of time to get the notice from McKenzie county to Bottineau county. In *Hunt v. Swenson*, 15 N. D. 512, 108 N. W. 41, an order vacating a default judgment under circumstances similar to this, but more favorable to the defendant, was reversed by the supreme court. In the case cited judgment by default was not entered until after sixty days from the service of the summons, but the execution was issued eight days after the entry of the judgment and a month after the execution levy the defendant moved to vacate. They had consulted one whom they supposed to be a lawyer, paid him a retainer and relied upon his attention to the case. True, there was a dispute as to their agreement with their attorney; but here there was no dispute, no hiring of counsel, no attempt to answer, and no misunderstanding of the nature of the case.

"In *Bazal v. St. Stanislaus Church*, 21 N. D. 602, 132 N. W. 212, the officers of the defendant Church received the summons and complaint, put them in their pockets and either forgot about them or considered there was no hurry, or misunderstood the necessity for prompt action. Immediately upon learning of the entry of judgment they took steps to open the judgment, but the same were delayed from time to time on account of the necessity of having a meeting of the board. The affidavits showed the priest and officers knew of the nature of the action, or claim, though the priest said he understood English imperfectly and could only speak, read, and write it to a slight extent. The trial court vacated the judgment but the supreme court reversed the order saying 'If we sustain the order vacating it [the judgment] it will furnish a precedent for vacating any default judgment entered, when the only excuse is that the defendant knowingly permits judgment to be taken because it is more convenient to do so than to give it the necessary attention.' Mr. Cooper, the attorney for the plaintiff, took all possible precautions to give the defendant notice. He told him he was going to bring the suit and sent him a copy of the papers that would be issued. He notified him of the probable time the sheriff would serve them; he waited six weeks after the service before he entered judgment; almost a month thereafter he notified him of the amount of the judgment and the date, and it is not until the time the defendant sees he will have to pay that he moves to reopen. If such careful proceedings on the part of the counsel cannot be relied upon to sustain a judgment then it is useless to make rules for the vacation of judgments and there would be no finality. When we consider the defendant reads and writes English; that he shows familiarity with the language; that he admits having read parts of the complaint; that he never consulted counsel; made no attempt to answer or appear, and that no fraud was practiced on him, on the contrary he was fully and completely notified; that he defied the parties to sue, in effect, and told them he didn't want to hear any more about the case and nowhere specifically denies, in the correspondence, that he is guilty, I cannot see where there was mistake or excusable neglect. In the case of *Kjetland v. Pederson*, 20 S. D. 58, 104 N. W. 677, the summons was regularly served and defendant read it. No complaint was filed until afterwards, the defendant neglected to consult counsel, answer or appear; the case is regularly tried and

verdict rendered; no fraud was practised on the defendant nor any attempt to deceive him, though plaintiff's attorney told defendant he could give him no information in regard to the case. The supreme court held that an order refusing to vacate the judgment is good and affirmed the same. Here the facts are quite similar but the attorney for the plaintiff was much kinder and gave him full notice that the action would be brought, what would be done, the steps that were taken and the amount of the judgment entered. The defendant cannot be mistaken. He knew what the case was about. His neglect cannot be excused because there is no excuse for it, and if this default judgment were to be opened then there is no use in taking a judgment by default."

The memorandum decision shows that the trial judge carefully considered the facts and circumstances bearing upon the question of mistake and excusable neglect; and that he applied to those facts the legal principles announced in the decisions of this court. Clearly the trial judge did not exercise any capricious or arbitrary discretion; but he decided the matter before him "according to his judgment of what was fair, equitable, and wholesome, as determined by the peculiar circumstances of the case, and as discerned by his personal wisdom and experience, guided by the spirit, principles, and analogies of the law." In my opinion there is no good reason for saying that the trial court abused its discretion. The order appealed from should be affirmed.

BIEDZELL, J., concura.

JOHN H. SHARY, Respondent, v. CHRISTIAN ESZLINGER and
Otilia Eszlinger, Appellants.

(176 N. W. 938.)

Judgments — foreign judgments — full faith and credit to same extent only to which it is entitled in state where judgment rendered.

1. By virtue of the full faith and credit provision of the Federal Constitution, the courts of this state are bound to give to the judgment of a sister state the same faith and credit, and only the same, which it has in the state where it was rendered; if re-examinable, or subject to defense on certain grounds there, it is open to the same inquiries and subject to the same defenses here.

Judgments — vacation of — equitable excuse may be interposed in this state against a judgment obtained by fraud in another state — when.

2. The requirement that full faith and credit shall be given in one state to the judgments obtained in another will not prevent the courts of this state, in which legal and equitable rights and remedies are administered in one court and in one form of action, from permitting an equitable defense to be interposed against a judgment obtained by fraud in another state, where the courts of the state where the judgment was rendered are authorized to vacate or enjoin the enforcement of a judgment obtained by fraud.

Opinion filed March 2, 1920.

From a judgment of the District Court of Logan County, *Graham*, J., defendants appeal.

Reversed.

Geo. M. McKenna and Miller, Zuger & Tillotson, for appellants.

The defense of fraud in the procurement of a sister state judgment is available as a defense upon an action upon such judgment, and that such attack is not collateral and is not contrary to the full faith and

NOTE.—On right to resist judgment of sister state on ground of fraud, see note in 32 L.R.A. (N.S.) 905.

On decision under full faith and credit provision as a Federal question, see note in 62 L.R.A. 529.

For authorities passing on the question of judgment of the courts of other states, see comprehensive note in 103 Am. St. Rep. 304.

On faith and credit which a judgment of one state has in another, see note in 36 L. ed. (U. S.) 1123.

credit clause of the Federal Constitution, nor the Statute of 1790. *Levin v. Gladstin*, 142 N. C. 482, 32 L.R.A. (N.S.) 905, 55 S. E. 371, and notes.

It was not incumbent upon the defendants to apply to the Texas court to be relieved of the judgment there obtained. *Fleming v. Seligson*, 57 Tex. 524; *Delhart Real Estate Agency v. Le Masrer*, 62 Tex. Civ. App. 579.

The facts pleaded in the answer herein, if addressed to the Texas court, would have authorized and made it the duty of that court to afford the defendants adequate relief. *Mottu v. Davis*, 151 N. C. 237, 65 S. E. 969.

It is sufficient to annul a judgment or restrain the enforcement thereof if the successful party has kept the unsuccessful party away from court by a false promise of a compromise. *United States v. Throckmorton*, 98 U. S. 61, 25 L. ed. 93; *Vance v. Burbank*, 101 U. S. 514, 25 L. ed. 929; *Wilson v. Anthony*, 72 N. J. Eq. 836, 66 Atl. 907; *Snyder v. Critchfield*, 44 Neb. 66, 62 N. W. 306; *Keeler v. Elston*, 22 Neb. 310, 34 N. W. 891; *Payne v. O'Shea*, 84 Mo. 129; *Crim v. Crim*, 162 Mo. 544, 54 L.R.A. 502.

The recent case of *Levin v. Gladstin*, 32 L.R.A. 905, is fully annotated and contains practically all the cases bearing upon the question before the court.

If the judgment was fraudulently obtained, then every defense which the maker of the notes had as against the bank might properly be shown upon the trial. *Bank of Sharron v. Anderson* (Wyo.) 48 Pac. 197; *Same case*, 53 Pac. 280; *Drinkard v. Ingram*, 21 Tex. 650.

R. H. Sherman, Arthur B. Atkins, Scott Cameron and E. T. Burke, for respondent.

The plea of *nil debit* is not good in an action brought in one state upon judgment rendered in another, after personal service of process upon the judgment debtor. *Mills v. Duryee*, 7 Cranch, 481, 3 L. ed. 411.

A plea to an action upon a judgment rendered in a court of competent jurisdiction in a sister state, in a suit contested by the defendant, alleging that judgment was procured by the fraud of plaintiff is bad on demurrer. *Christmas v. Russell*, 5 Wall. 290, 18 L. ed. 475; *Max-*

well v. Stewart, 21 Wall. 71, 22 L. ed. 564; Simmons v. Saul, 138 U. S. 439, 34 L. ed. 1054.

The Texas judgment is merely voidable, and not void, and the attack must therefore be made in a direct proceeding, and not collaterally. Mikeske v. Blum, 63 Tex. 46; Murchison v. White, 54 Tex. 46; Fleming v. Seligson, 57 Tex. 531; Williams v. Haynes, 77 Tex. 284; Marin v. Augendahl, 32 N. D. 536.

A judgment rendered by a court of competent jurisdiction may be impeached for fraud only in a direct proceeding brought for that purpose in the court in which it was rendered. McDonald v. Drew, 64 N. H. 547, 15 Atl. 148.

CHRISTIANSON, Ch. J. This is an action upon a judgment rendered in favor of the plaintiff and against the defendants by the district court of Hidalgo county, Texas. A verdict was directed in favor of the plaintiff and defendants have appealed.

The defense pleaded was: that the defendants by reason of the fraud and deceit of the plaintiff were prevented from appearing and defending in the Texas court; that the judgment rendered by said court against the defendants was obtained by reason of the fraudulent acts of the plaintiff; and that defendants had a complete defense to the action, which defense they were prevented from asserting by reason of plaintiff's said fraudulent acts.

Upon the trial, the defendants offered to prove such defense, but the trial court ruled that by virtue of the full faith and credit clause of the Federal Constitution (U. S. Const. art. 4, § 1) the judgment could not be assailed on the ground that it was procured by fraud. The correctness of such ruling is challenged on this appeal.

The provision that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state" was intended to prevent discrimination by the several states against the citizens and public authority and proceedings of other states. Cooley, Const. Lim. 7th ed. pp. 36-41. In his work on the Constitution, Story suggests that the motive for the full faith and credit provision in the Federal Constitution "must have been, 'to form a more perfect union,' and to give to each state a higher security and confidence in the others by attributing a superior sanctity and con-

clusiveness to the public acts and judicial proceedings of all. There could be no reasonable objection to such a course. On the other hand, there were many reasons in its favor. The states were united in an indissoluble bond with each other. The commercial and other intercourse with each other would be constant and infinitely diversified. Credit would be everywhere given and received; and rights and property would belong to citizens of every state in many other states than that in which they resided. Under such circumstances, it could scarcely consist with the peace of society, or with the interest and security of individuals, with the public or with private good, that questions and titles, once deliberately tried and decided in one state, should be open to litigation again and again, as often as either of the parties, or their privies, should choose to remove from one jurisdiction to another. It would occasion infinite injustice, after such trial and decision, again to open and re-examine all the merits of the case." Story, Const. 5th ed. § 1309.

Story further says that the true intent and meaning of the full faith and credit clause, as applied to judgments, is that "it gives them the same faith and credit as they have in the state court from which they are taken. If in such court they have the faith and credit of the highest nature, that is to say, of *record* evidence, they must have the same faith and credit in every other court. So, that Congress have declared the *effect* of the records, by declaring, what degree of faith and credit shall be given to them. If a judgment is conclusive in the state where it is pronounced, it is equally conclusive everywhere. *If re-examinable there, it is open to the same inquiries in every other state.*" Story, Const. 5th ed. § 1313.

The views thus expressed by Story were afterwards approved and adopted by the Supreme Court of the United States. See *McElmoyle v. Cohen*, 13 Pet. 312, 10 L. ed. 177. See also *Hampton v. McConnel*, 3 Wheat. 233, 4 L. ed. 378. In *Embry v. Palmer*, 107 U. S. 3, 27 L. ed. 346, 2 Sup. Ct. Rep. 25, which was an action to restrain the enforcement of a judgment of the District of Columbia, when sued upon in Connecticut, on the ground of fraud in procuring the judgment, the court said: "The rule for determining what effect shall be given to such judgments is that declared by this court in respect to the faith and credit to be given to the judgments of state courts in the courts of

other states in the case of *M'Elmoyle v. Cohen*, 13 Pet. 312, 326, 10 L. ed. 177, 185, where it is said: 'They are record evidences of a debt or judgment of record, to be contested only in such way as judgments of record may be, and consequently are conclusive upon the defendant in every state, except for such causes as would be sufficient to set aside the judgment in the courts of the state in which it was rendered.' The question then arises, what causes would have been sufficient in the District of Columbia according to the law there in force, to have authorized its courts to set aside the judgment recovered there by *Embry* against *Stanton & Palmer*?

This is answered by the decision of this court, upon the point in the case of *Marine Ins. Co. v. Hodgson*, 7 Cranch, 332, 3 L. ed. 362. That was a bill in equity, filed in a court of the District of Columbia, perpetually to enjoin the collection of so much of a judgment at law, recovered in the District as was in excess of an amount claimed to be the sum equitably due. The grounds of relief alleged were, that a fraud had been practised upon the underwriters in a valued policy of marine insurance, by an overvaluation of the ship, and that the complainant had been prevented from making the defense at law. Chief Justice Marshall, delivering the opinion of the court, affirming the decree of the court below dismissing the bill, stated the rule as follows:

"Without attempting to draw any precise line, to which courts of equity will advance and which they cannot pass, in restraining parties from availing themselves of judgments obtained at law, it may safely be said that any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law or of which he might have availed himself at law but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery. On the other hand, it may with equal safety be laid down as a general rule that a defense cannot be set up in equity, which has been fully and fairly tried at law, although it may be the opinion of that court that the defense ought to have been sustained at law.' . . .

"This was held to be the law prevailing in the District of Columbia, not by reason of any local peculiarity, but because it was a general principle of equity jurisprudence."

It follows as a corollary to the doctrine that the judgment of a state court has the same effect in every other court in the United States, which it had in the state where it was rendered, that "no greater effect can be given to any judgment of a court of one state, in another state, than is given to it in the state where rendered. Any other rule would contravene the policy of the provisions of the Constitution and Laws of the United States on that subject." *Board of Public Works v. Columbia College*, 17 Wall. 521, 21 L. ed. 687. See also *Robertson v. Pickrell*, 109 U. S. 608, 27 L. ed. 1049, 3 Sup. Ct. Rep. 407; *Overby v. Gordon*, 177 U. S. 608, 44 L. ed. 741, 20 Sup. Ct. Rep. 603.

Applying these principles, the question presented in this case resolves to this: Would the facts set forth in the answer, and covered by the proof, be sufficient to authorize the courts of Texas to set aside the judgment or enjoin the enforcement thereof?

By the express terms of our statutes we are required to take judicial notice of the laws of the state where the judgment was rendered. Comp. Laws 1913, subd. 64, § 7938. See also *Babcock v. Marshall*, 21 Tex. Civ. App. 145, 50 S. W. 728. And, upon examining the decisions of the appellate courts of Texas, we find that in that state a judgment obtained by fraud may be vacated or enforcement thereof enjoined. Some of the cases even go to the extent of holding that fraud may be urged as a legal defense against the judgment. See *Dickenson v. McDermott*, 13 Tex. 249; *Overton v. Blum*, 50 Tex. 423; *Byars v. Justin*, 2 Tex. App. Civ. Cas. (Willson) 603; *Nevins v. McKee*, 61 Tex. 413; *Harn v. Phelps*, 65 Tex. 598; *Cayce v. Powell*, 20 Tex. 768, 73 Am. Dec. 211; *Rodriguez v. Lee*, 26 Tex. 32; *Hutchins v. Lockett*, 39 Tex. 166; *Roller v. Wooldridge*, 46 Tex. 485; *Coffee v. Ball & Co.* 49 Tex. 6; *Babcock v. Marshall*, 21 Tex. Civ. App. 145, 50 S. W. 728; *Lindsley v. Sparks*, 20 Tex. Civ. App. 56, 48 S. W. 204; *Delhart Real Estate Agency v. Le Master*, 62 Tex. Civ. App. 579, 132 S. W. 860; *Gulf, C. & S. F. R. Co. v. Stephenson*, — Tex. Civ. App. —, 26 S. W. 236. See also *St. Louis Expanded Metal Fireproofing Co. v. Beilharz*, — Tex. Civ. App. —, 88 S. W. 512.

In *Overton v. Blum*, 50 Tex. 423, paragraph 2 of the syllabus reads: "When a judgment has been obtained by fraud, accident, or mistake, and without any want of diligence on the part of the party against whom it was rendered, the district court, in the exercise of its equity

powers, may grant relief by re-examining the case on its merits, and granting such relief as equity and justice may demand."

In *Harn v. Phelps*, 65 Tex. 598, it was held that a judgment may be set aside in a separate proceeding brought for that purpose when it is shown that the party maintaining the proceeding "was prevented from urging against the judgment of which she complains objections which would or ought to have prevented its rendition; and that such prevention resulted from fraud, accident, or the acts of the adverse party, without any fault or negligence on her part."

In *Hutchins v. Lockett*, 39 Tex. 166, which was an action of trespass to try title, the defendant was permitted to assail a decree for specific performance on the ground that certain moneys tendered into court in the specific performance suit had been withdrawn. The court said, "that a judgment rendered by a court of competent jurisdiction cannot be attacked in a collateral proceeding is a rule of almost universal application. Nevertheless, a judgment may be impeached in any proceeding upon the ground of fraud or satisfaction. It is said that the maxim that fraud vitiates everything applies to judgments (*Freem. Judgm. p. 90*); and *this rule may be applied to judgments affected by fraud, whether the fraud arises before, at the time of, or after, the rendition of the judgment*. The court has only to determine that a judgment is founded in fraud, in order to authorize its impeachment as a nullity." 39 Tex. 169.

In *Rodriguez v. Lee*, 26 Tex. 32, which was an action of trespass to try title, the court held that "where defendants in an action of trespass to try title were permitted under the general issue to offer evidence of title in themselves by purchase at sheriff's sale under a judgment against the plaintiff, it was competent for the plaintiff to rebut such evidence by proving that the judgment was obtained by fraud; and, under such circumstances, it was not incumbent on the plaintiff to plead any facts showing the nullity of such judgment, or of the title set up under it."

No courts have been more emphatic in declaring that fraud practised in obtaining a judgment may be pleaded as an equitable defense in an action on a judgment rendered in a sister state than the courts of Texas.

In *Babcock v. Marshall*, 21 Tex. Civ. App. 145, 50 S. W. 728, which

was an action upon a judgment rendered by the circuit court of Cook county, Illinois, the Texas court said: "There are several cases decided by the courts of this state upon this subject, some of which directly, and others inferentially, hold that fraud can be interposed as a defense to the judgment of a sister state, when sued upon here. . . . If we felt constrained to follow the decisions of the courts of this state, to the effect that fraud as a strictly legal defense may be charged against the plaintiff to defeat a recovery in a suit based upon the judgment of a sister state, it would not be necessary that we should so declare ourselves in this case, because, in our opinion, the judgment of the trial court may be affirmed upon other grounds. In addition to the assertion of fraud in procuring the judgment as a strictly legal defense, the defendant in error urged the same state of facts as a basis for equitable relief against the judgment and the enforcement of same by plaintiff in error. *It is a general principle of equity, which may be said to exist in nearly, if not, all of the states of the Union, that a judgment at law, which was procured by the fraudulent conduct of the plaintiff, which had the effect to deprive the defendant of a meritorious legal defense which he was not guilty of negligence in urging, may be enjoined, and the plaintiff restrained from enforcing it.* Embry v. Palmer, 107 U. S. 11, 27 L. ed. 349, 2 Sup. Ct. Rep. 25; 2 High, Inj. 3d ed. §§ 190-208, and cases thereafter cited. The statute of the United States which gives effect to the provision of the Constitution that declares that full faith and credit shall be given in each state to the public records, etc., of any other state, uses this language: 'And the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state whence the said records are or shall be taken.' U. S. Rev. Stat. § 905, Comp. Stat. § 1519, 3 Fed. Stat. Anno. 2d ed. p. 212. In Embry v. Palmer, 107 U. S. 10, 27 L. ed. 349, 2 Sup. Ct. Rep. 31, which was an action to restrain the enforcement of a judgment of the District of Columbia, when sued upon in Connecticut, on the ground of fraud in procuring the judgment, the court said: 'The rule for determining what effect shall be given to such judgments is that declared by this court in respect to the faith and credit to be given to the judgments of state courts in the courts of other states in the case of McElmoyle v. Cohen, 13 Pet. 312,

326, 10 L. ed. 177, 184, where it is said: "They are record evidences of a debt, or judgments of record, to be contested only in such way as judgments of record may be; and, consequently, are conclusive upon the defendant in every state, *except for such causes as would be sufficient to set aside the judgment in the courts of the state in which it was rendered.*" The question then arises, what causes would have been sufficient in the District of Columbia according to the law there in force to have authorized its courts to set aside the judgment recovered there by Embry against Stanton & Palmer? *It is clear from this that it was not the purpose of the Constitution to give to the judgments of a state court a more conclusive effect, when sought to be enforced in a sister state, than they would be entitled to in the state where rendered. And it is also clear that the existence of the general principles of equity which authorize restraining a judgment procured through fraud in the state where the judgment was originally rendered is authority for a like procedure in the courts of a different state where it is afterwards sought to be enforced, provided the courts of the latter state are not wanting in jurisdiction to enforce such a remedy.* As to the existence of such a remedy in this state, there can be no question, as illustrated in the following cases: *Dickenson v. McDermott*, 13 Tex. 249; *Overton v. Blum*, 50 Tex. 423; *Byars v. Justin*, 2 Tex. App. Civ. Cas. (Willson) 603; *Nevens v. McKee*, 61 Tex. 413; *Harn v. Phelps*, 65 Tex. 596."

In this state all distinctions between actions at law and suits in equity are abolished. Comp. Laws 1913, § 7355. "The defendant may set forth by answer as many defenses and counterclaims as he may have, whether they are such as have been heretofore denominated legal or equitable." Comp. Laws 1913, § 7449. The district court concededly is vested with jurisdiction, not only of the cause of action alleged in the complaint, but, of all actions to vacate judgments or to enjoin their enforcement. The plaintiff invoked the jurisdiction of the district court of Logan county, and asked that he be awarded judgment against the defendants for the amount of the Texas judgment. In his complaint he averred,—and the exemplified record shows,—that the Texas judgment was obtained by default. In their answer the defendants averred that they had a complete defense to the claim upon which the judgment is based, but that they were prevented from asserting such defense by reason of the fraud and deception of the plaintiff. The

defendants, therefore, invoked the equity powers of the court, and asked "that the plaintiff be restrained from asserting said judgment in the state of North Dakota." We have no hesitancy in holding that if the facts are as set forth in the answer it would have been the duty of the trial court to have vacated a domestic judgment. And as we have already noticed the facts averred would have authorized a Texas court to have vacated the judgment or enjoined its enforcement. Hence, it seems clear that the defendants are entitled to assert these same facts as a defense, or as a basis for affirmative relief, against the Texas judgment in an action thereon in this state. To so hold does not deny to the judgment any faith or credit which it has in Texas, but merely permits it to be attacked in this state upon the same grounds that it might have been attacked there. To say that it is not subject to such attack here would in effect give to it greater faith and credit than it is entitled to at home. Black, Judgm. 2d ed. § 918.

But respondent contends that the United States Supreme Court has ruled directly, that in an action on a judgment of a sister state, the defendant cannot plead that the judgment was obtained by fraud, and cites certain cases which it is claimed sustain the contention.

Especial reliance is placed upon the following statement in *Hanley v. Donoghue*, 116 U. S. 1, 29 L. ed. 535, 6 Sup. Ct. Rep. 242: "Judgments recovered in one state of the Union, when proved in the courts of another differ from judgments recovered in a foreign country in no other respect than that of not being re-examinable upon the merits, not impeachable for fraud in obtaining them, if rendered by a court having jurisdiction of the cause and of the parties."

It is true that this statement standing alone sustains the contention of the respondent; but the case did not call for an expression upon the question whether fraud in the procurement of a judgment might be asserted as a defense in an action on a judgment of a sister state. In that case an action was brought in Maryland upon a judgment which had been obtained in the state of Pennsylvania, in an action of covenant, against Charles Donoghue, together with one John Donoghue.

"The declaration contained three counts. The first count set forth the recovery and record of the judgment as aforesaid in said court of common pleas, and alleged that it was still in force and unreversed. The second count contained similar allegations, and also alleged that

in the former action Charles Donoghue was summoned, and property of John Donoghue was attached by process of foreign attachment, but he was never summoned and never appeared, and that the proceedings in that action were duly recorded in that court. The third count repeated the allegations of the second count, and further alleged that 'by the law and practice of Pennsylvania the judgment so rendered against the two defendants aforesaid is in that state valid and enforceable against Charles Donoghue and void as against John Donoghue,' and that 'by law of Pennsylvania any appeal from the judgment so rendered to the supreme court of Pennsylvania (which is the only court having jurisdiction of appeals from the said court of common pleas) is required to be made within two years of the rendition of the judgment, nevertheless no appeal has ever been taken from the judgment so rendered against the said defendants, or either of them.'

"The defendant filed a general demurrer to each and all of the counts, which was sustained, and a general judgment rendered for him. Upon appeal by the plaintiffs to the court of appeals of the state of Maryland, the judgment was affirmed. 59 Md. 239, 43 Am. Rep. 554. The plaintiffs thereupon sued out writ of error, on the ground that the decision was against a right and privilege set up and claimed by them under the Constitution and laws of the United States." 116 U. S. 1, 29 L. ed. 536, 6 Sup. Ct. Rep. 242.

Not only is the statement in *Hanley v. Donoghue*, *supra*, to the effect that judgments recovered in one state of the Union, when proved in the courts of another, are not impeachable for fraud in obtaining them, *obiter dictum*, but in at least one subsequent decision the Supreme Court of the United States has announced, and cited with approval cases supporting the contrary doctrine. In *Cole v. Cunningham*, 133 U. S. 107, 33 L. ed. 538, 10 Sup. Ct. Rep. 269, the United States Supreme Court sustained a decree of the supreme judicial court of Massachusetts restraining the defendants, citizens of that commonwealth, from the prosecution of attachment suits in the state of New York. In disposing of the contention that the decree of the Massachusetts court refused to give full faith and credit to the judicial proceedings of the state of New York, the court said: "This does not prevent an inquiry into the jurisdiction of the court, in which a judgment is rendered, to pronounce the judgment, nor into the right of the state to exercise

authority over the parties or the subject-matter, *nor whether the judgment is founded in, and impeachable for, a manifest fraud.* The Constitution did not mean to confer any new power on the states, but simply to regulate the effect of their acknowledged jurisdictions over persons and things within their territory. It did not make the judgments of the states domestic judgments to all intents and purposes, but only gave a general validity, faith, and credit to them as evidence. . . . These well-settled principles find pertinent illustration in the decisions of the highest tribunal of the state of New York, to one of which we refer, as the contention is that the decree under review was on some way an unconstitutional invasion of the jurisdiction of that state. In *Dobson v. Pearce*, 12 N. Y. 156, 62 Am. Dec. 152, the plaintiff in a judgment, recovered in New York, brought an action upon it in the superior court of Connecticut, whereupon the defendant in the judgment filed a bill against the plaintiff on the equity side of the same court, alleging that the judgment was procured by fraud, and praying relief. The plaintiff in the judgment appeared in and litigated the equity suit, and the court adjudged that the allegations of fraud in obtaining the judgment were true, and enjoined him from prosecuting an action upon it. He assigned the judgment, and it was held in a suit in New York, brought thereon by the assignee, that a duly authenticated copy of the record of the decree in the Connecticut court was conclusive evidence that the judgment was obtained by fraud.

"The court of appeals held that while a judgment rendered by a court of competent jurisdiction could not be impeached collaterally for error or irregularity, yet it could be attacked upon the ground of want of jurisdiction, or of fraud or imposition; that the right of the plaintiff in the judgment was a personal right, and followed his person; that when the courts of Connecticut obtained jurisdiction of her person by the due service of process within the state, these courts had full power to pronounce upon the rights of the parties in respect to the judgment, and to decree concerning it; that the jurisdiction of a court of equity anywhere, to restrain suit upon a judgment at law, upon sufficient grounds, was one of the firmly established parts of the authority of courts of equity; and that it could not be held that a court of equity in one state had no jurisdiction to restrain such a suit upon a judgment of a court of law of another state. If the objection to so doing

was founded upon an assumed violation of the comity existing between the several states of the United States, that did not reach to the jurisdiction of the court, a rule of comity being a self-imposed restraint upon an authority actually possessed; and as to the objection that the Constitution of the United States and the laws made in pursuance of it inhibited the action of the Connecticut courts, this could not prevail, since the full faith and credit are given to the judgment of a state court when in the courts of another state it receives the same faith and credit to which it was entitled in the state where it was pronounced. *Pearce v. Olney*, 20 Conn. 544; *Engel v. Scheuerman*, 40 Ga. 206, 2 Am. Rep. 573; *Cage v. Cassidy*, 23 How. 109, 16 L. ed. 430."

In *Jaster v. Currie*, 198 U. S. 144, 49 L. ed. 988, 25 Sup. Ct. Rep. 614, the court said: "We will assume that, on general demurrer, a plea that the judgment was obtained by fraud would be a good equitable plea." And in *Howard v. De Cordova*, 177 U. S. 609, 44 L. ed. 908, 20 Sup. Ct. Rep. 807, it was held that a Federal court may take jurisdiction of a suit to set aside a judgment of a state court, "when it is attacked for fraud and want of jurisdiction because it was rendered on service by publication, the order for which was obtained by a false affidavit." See also *Cooper v. Newell*, 173 U. S. 555, 43 L. ed. 808, 19 Sup. Ct. Rep. 506.

The above cited decisions speak for themselves. They indicate at least that the United States Supreme Court does not consider the general statements in the decisions upon which respondent relies as applicable or controlling in a proceeding in equity to enjoin the enforcement of a judgment obtained by fraud.

We are of the opinion, and hold, that under our practice the defendants may assert in this action that the Texas judgment was obtained by plaintiff's fraud. Such holding is in harmony with the views expressed by many of the state courts, and by legal writers of recognized ability. See *Black*, *Judgm.* 2d ed. §§ 917, 918; *Bailey*, *Jur.* §§ 202, 203; *Freeman*, *Judgm.* § 576; *Pom. Eq. Juris.* 3d ed. § 919; *Rogers v. Gwinn*, 21 Iowa, 58; *Gundlach v. Park*, 140 Minn. 78, 165 N. W. 969, 167 N. W. 302; *Pearce v. Olney*, 20 Conn. 544; *Dobson v. Pearce*, 12 N. Y. 156, 62 Am. Dec. 152; *Stevens v. Central Nat. Bank*, 144 N. Y. 50, 39 N. E. 68; *Davis v. Cornue*, 151 N. Y. 172, 45 N. E. 449; *Trebilcox v. McAlpine*, 62 Hun, 317, 17 N. Y. Supp. 221; *White v.* 45 N. D.—10.

Reid, 70 Hun, 197, 24 N. Y. Supp. 290; Keeler v. Elston, 22 Neb. 310, 34 N. W. 891; Snyder v. Critchfield, 44 Neb. 66, 62 N. W. 306; Davis v. Headley, 22 N. J. Eq. 115; Wilson v. Anthony, 72 N. J. Eq. 836, 66 Atl. 907; Keith v. Algar, 114 Tenn. 1, 85 S. W. 71; Bank of Chadron v. Anderson, 6 Wyo. 518, 48 Pac. 197, 49 Pac. 406, 7 Wyo. 441, 53 Pac. 280; Marx v. Fore, 51 Mo. 69, 11 Am. Rep. 432; Ward v. Quinlivan, 57 Mo. 425; Payne v. O'Shea, 84 Mo. 129; Warrington v. Ball, 33 C. C. A. 609, 62 U. S. App. 413, 90 Fed. 464; Levin v. Gladstein, 142 N. C. 482, 32 L.R.A.(N.S.) 905, 115 Am. St. Rep. 747, 55 S. E. 371.

The situation in this case is identical with that involved in Pearce v. Olney, 20 Conn. 544, and Dobson v. Pearce, 12 N. Y. 156, 62 Am. Dec. 152. The action was brought in a court of law in Connecticut upon a New York judgment. Thereafter the defendant instituted an action in equity to enjoin the prosecution of the action at law. Here the plaintiff instituted an action upon the judgment in the district court. Thereupon the defendants invoked the equitable powers of that court, and asked that plaintiff be restrained from asserting the judgment sued upon in this state. In view of our reformed procedure, the defendants were not required to institute a new action. They might assert their equitable cause by proper averments in their answer. This they have done. They have set forth facts in the nature of a bill in equity, and prayed "that the plaintiff be restrained from asserting said judgment in the state of North Dakota, and for such other and further relief as may seem just to the court."

It follows from what has been said that the judgment appealed from must be reversed and the cause remanded for a new trial.

It is so ordered.

BIRDZELL and ROBINSON, JJ., concur.

ROBINSON, J. (concurring): I have signed and do concur in the thorough and well-considered opinion by Chief Justice Christianson. By another way I arrive at the same result.

The case illustrates that some judges and some lawyers are slow to learn the simple fact that it is not the purpose of the law or the courts to aid one person in the robbery of another. The appeal is from a

judgment on a directed verdict against the defendant for nearly \$4,000—the amount of a Texas judgment for the balance due on 39 acres of worthless land sold by the plaintiff to the defendant. Defendant is an innocent and unlearned Russian farmer of Logan county, North Dakota. He cannot read or write English and he does not know the tricks and deceptions of Texas land traders. In the spring of 1915 the plaintiff came to the farm of defendant in Logan county and by divers false representations induced the defendant to buy 39 acres of worthless land in Texas at \$200 an acre. He assured defendant that the land was well worth \$200, and that it was irrigated land and would produce three crops in a year. Without seeing the land or knowing anything of it defendant paid the plaintiff, in cash, \$1,000, conveyed to him 40 acres of land in Logan county worth \$1,600, and gave his promissory notes and obligations for the balance. Then defendant went to the Texas land, spent about \$800 in trying to cultivate and improve it, and found that only 3 acres of it could be irrigated, and that it was of no value. Then he abandoned the land and returned to North Dakota. But as he was leaving Texas the plaintiff served on him process in an action to recover the balance due on the contract, and by default a judgment of foreclosure was taken on which the Texas land was sold and bid in by the plaintiff for about 10 per cent of its price to defendant. Now the plaintiff has his Texas land and the improvements, worth, at his figure, \$8,000, and his cash payment, \$1,000, his land payment, \$1,600, and he seeks to recover \$4,000.

These facts do constitute a counterclaim on which defendant should recover about \$8,000, which would more than offset the plaintiff's judgment. The defense is really a proper counterclaim which is connected with the subject of the action. Hence, on the facts stated in the answer, defendant is justly entitled to recover the same as if he had brought an action against the plaintiff. It is true that the counterclaim and cross action in the answer is defective in form, but that can be easily amended. The cause of action stated in the answer was not in any manner adjudicated by the Texas court, and as the plaintiff has appeared in our courts, he should not be allowed to depart and to dismiss the action without a proper judgment against him, which will more than offset the Texas judgment.



BRONSON, J. (specially concurring). In my opinion, the principal and serious question involved in this case, is whether the defense pleaded is available as a direct equitable action seeking to restrain the enforcement of the sister state judgment alleged and proved.

The effect to be given a sister state judgment, under the Federal Constitutional provision, has been the subject of much litigation and a considerable variety of interpretation in the cases adjudged.

It is fairly well settled, however, that a sister state judgment in a foreign state is to be regarded, ordinarily, upon the same footing as a domestic judgment, so far as the merits of the claim or subject-matter of the suit is concerned. Story, Const. 5th ed. § 1309; *M'Elmoyle v. Cohen*, 13 Pet. 312, 10 L. ed. 177.

In *Fauntleroy v. Lund*, 210 U. S. 230, 236, 52 L. ed. 1039, 1042, 28 Sup. Ct. Rep. 641, the principle, stated by Chief Justice Marshall in *Hampton v. M'Connel*, 3 Wheat. 234, 4 L. ed. 378, is restated as correct, that the judgment of the state court should have the same credit, validity, and effect in every other court in the United States, which it had in the state where it was pronounced, and that whatever pleas would be good to a suit thereon in such state, and none others, could be pleaded in any other court in the United States.

Otherwise stated, a sister state judgment, conclusive in the state where pronounced, is conclusive everywhere. However, this does not prevent an inquiry into the jurisdiction of the court where such judgment was rendered, or the right of a state to exercise authority over the persons or the subject-matter. Story, Const. 5th ed. § 1313. See note in 32 L.R.A.(N.S.) 909, 913, 917, 929.

In the instant case the pertinent question is whether equity in this state may intervene to restrain the enforcement of a sister state judgment for fraud, practised in the procurement and rendition of such judgment. The general principle has been recognized that a court of equity, either in a Federal or state court, or in a court of the state where the judgment was rendered, may enjoin through an independent action, the enforcement of a judgment upon equitable grounds. *Embry v. Palmer*, 107 U. S. 3, 27 L. ed. 346, 2 Sup. Ct. Rep. 25; *Simon v. Southern R. Co.* 236 U. S. 115, 124, 59 L. ed. 492, 498, 35 Sup. Ct. Rep. 255; *Marshall v. Holmes*, 141 U. S. 597, 601, 35 L. ed. 870, 874,

12 Sup. Ct. Rep. 62; *Cole v. Cunningham*, 133 U. S. 102, 33 L. ed. 538, 10 Sup. Ct. Rep. 269; 23 Cyc. 1557.

In the early case of *Marine Ins. Co. v. Hodgson*, 7 Cranch, 332, 3 L. ed. 362, where an action was brought in equity to perpetually enjoin a judgment, Chief Justice Marshall concerning the relief that a court in equity might grant in such case stated:

"Without attempting to draw any precise line to which courts of equity will advance, and which they cannot pass, in restraining parties from availing themselves of judgments obtained at law, it may safely be said that any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law; or of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery.

"On the other hand it may with equal safety be laid down as a general rule that a defense cannot be set up in equity which has been fully and fairly tried at law, although it may be the opinion of that court that the defense ought to have been sustained at law." See *Marshall v. Holmes*, 141 U. S. 597, 601, 35 L. ed. 870, 874, 12 Sup. Ct. Rep. 62.

In *Cole v. Cunningham*, 133 U. S. 107, 33 L. ed. 538, 10 Sup. Ct. Rep. 269, the principle, concerning sister state judgments, is recognized upon a lengthy consideration of authorities, that a sister state judgment, under the constitutional provisions and the congressional act therefor, shall have such faith and credit given in every court within the United States as it has by law and usage in the courts of the state where rendered, but that this did not prevent the right of a state to exercise authority over the parties or the subject-matter, nor, whether the judgment was founded in, and impeachable, for, a manifest fraud.

I am satisfied, that, under the authorities quoted in the opinion of the Chief Justice, a direct, equitable action could be maintained in Texas, based upon the grounds set up in the defense in this action, to restrain the enforcement of such Texas judgment; that in this state this power may likewise be exercised by seeking directly the aid of the equity to restrain the enforcement of this judgment in this state; this judgment, in itself cannot be impeached in this state by the defense offered, for clearly it appears upon the record that the Texas court

had jurisdiction, both over the parties and the subject-matter; that the judgment, as there rendered, so far as the judgment itself is concerned, is a valid sister state judgment until set aside by the court which pronounced it. The power of this court, however, to restrain the enforcement of that judgment where it is unconscionable so to do, presents a different matter and different considerations. Such power goes to the exercise of equity, independently to restrain the party, the plaintiff in this case, from seeking in this jurisdiction to enforce his judgment where it is unconscionable and inequitable for him so to do.

The exercise of such power by this state does not deprive the plaintiff of his Federal Constitution protection under the full faith and credit clause. *Cole v. Cunningham*, supra.

Under our practice, where causes of legal and equitable cognizance may be considered in the same case, I am of the opinion that as a court in equity those matters of defense pleaded by the defendant, which are directly available for the purposes of establishing fraud in the procurement and rendition of the judgment involved, are available for purposes of seeking directly the aid of equity to enjoin or restrain the enforcement of the sister state judgment. These matters are for the consideration of a court in equity. An opportunity should be given upon this record, to the defendant to so assert, directly, such matters pleaded in defense, properly to be considered in accordance with the principles herein stated. The trial court did not err in determining the judgment to be a valid sister state judgment. The judgment should be reversed and remanded for further proceedings, consonant with the principles herein stated.

GRACE, J., concurs.

ADOLF POLLAK, Plaintiff, v. D. E. ROBERTS, Defendant.

(176 N. W. 957.)

Specific performance — to be enforceable in equity, there must be complete contract.

1. In order to be enforceable in equity there must have been a clear, mutual understanding, and a positive assent on both sides as to the terms of the con-

tract; i. e., there must be a complete contract, finally concluded and agreed upon.

Contracts — offer and acceptance — acceptance must be unconditional.

2. Before an acceptance of an offer becomes a binding contract, the acceptance must be unconditional, and must accept the offer without modification or the imposition of new terms.

Opinion filed March 10, 1920.

From a judgment of the District Court of Renville County, *Leighton, J.*, plaintiff appeals.

Affirmed.

Ben E. Combs, for plaintiff.

The maxim, "that is certain which can be made certain," when applied to the contract in question, renders the description sufficiently certain. *Schuyler v. Wheelon*, 17 N. D. 161, 115 N. W. 259; *Inglis v. Fohey*, 116 N. W. 857.

The contract as between the plaintiff and defendant in the case at bar was plain and clear. *Boehm v. Long*, 172 N. W. 862.

McGee & Goss, for defendant.

The law is, if a proposition is made by a letter it must be accepted unconditionally in order to make a contract. *Harriman*, Contr. §§ 156, 323; *Flashier v. Flatyer*, 134 N. W. 556; *Egger v. Nesbitt*, 122 Mo. 667, 43 Am. St. Rep. 596; *Northwestern Iron Co. v. Meade*, 21 Wis. 474; *Sawyer v. Brossart* (Iowa) 25 N. W. 876; *Baker v. Holt*, 56 Wis. 100, 14 N. W. 8; *Cram v. Long*, 154 Wis. 14, 142 N. W. 267; *Langellier v. Schaeffer* (Minn.) 31 N. W. 690; *Lanz v. McLoughlin*, 14 Minn. 88; *Cram v. Long*, 154 Wis. 13, 142 N. W. 267; *Kull v. Wilson*, 162 N. W. 1072; *Knox v. McMurray*, 140 N. W. 652; *Beiseker v. Amberson* (N. D.) 116 N. W. 94.

CHRISTIANSON, Ch. J. Plaintiff brought this action to enforce the specific performance of an alleged contract for the sale of real property. Upon a trial to the court without a jury, judgment went against the plaintiff, and he has appealed to, and demanded a trial de novo in, this court.

On February 14, 1919, defendant wrote plaintiff as follows:

Superior, Wisconsin. February 14th, 1919.

Adolf Pollak,

Donnybrook, North Dakota.

Dear Sir:—

It seems to me that farm of mine near you is worth Thirty-six Hundred Dollars. I will sell it for that price if taken within the next twenty days. I want at least half cash, and balance secured by mortgage on the land drawing eight per cent interest, due on or before two years. How does that proposition hit you?

Yours truly,
D. E. Roberts.

Plaintiff replied:

February 21st, 1919.

Mr. D. E. Roberts,

Superior, Wisconsin.

Dear Sir:—

Regarding yours of February 14th, will say your offer has been accepted. I have deposited for you \$1,800 in the Carpio State Bank, Carpio, North Dakota. I therefore challenge you to furnish an abstract, clear title and deed. You perhaps have received a notice from that bank.

Yours for a deal,
Adolf Pollak.

Donnybrook, North Dakota, Route 3.

Later plaintiff wrote as follows:

2/27/1919.

Mr. D. E. Roberts,

Superior, Wisconsin.

Dear Sir:—

Regarding my last letter must draw your attention to the fact that I deposited \$1,800 for you at the Carpio State Bank, which was a mistake. I deposited the money, \$1,800 at the First National Bank at Carpio, North Dakota.

Yours respectfully,
Adolf Pollak,
Donnybrook, North Dakota, Route 3.

On February 20, 1919, the following letter was sent to the defendant by the First National Bank of Carpio:—

Carpio, North Dakota, February 20th, 1919.

D. E. Roberts,
Superior, Wisconsin.

Dear Sir:—

I have before me your letter of the 14th to Adolf Pollak of Donnybrook, in which you state that you will sell him your farm, the Northeast Quarter of Section 9-158-86, Renville county, for \$3,600, half cash and balance secured by mortgage on the land, on or before two years at eight per cent interest. Mr. Pollak accepts this offer and has deposited the \$1,800 here to be sent to you when you furnish him with warranty deed, together with abstract of title, etc. He will execute mortgage for balance according to your terms stated in your letter. If you will prepare papers and forward to this bank we will proceed to close the deal as soon as papers are satisfactory to Mr. Pollak.

Yours truly,

Oscar Herum, Cashier.

On March 1, 1919, defendant wrote plaintiff:

Superior, Wisconsin, March 1st, 1919.

Adolf Pollak,

Donnybrook, North Dakota.

Dear Sir:—

I have yours of the 27th of February and a letter from the bank at Carpio saying you had there deposited \$1,800. I have sent the abstract to be continued. As soon as I get it I will send it to the bank for you and your advisers to examine to see if you are satisfied with my title. It may be a week before it will get there.

Yours truly,

D. E. Roberts.

On March 10, 1919, the First National Bank of Carpio wrote defendant:

Carpio, No. Dak. March 10, 1919.

Mr. D. E. Roberts,
Superior, Wis.

Dear Sir:—

Under date of Feby. 20th, I wrote you that Mr. Adolf Pollak had deposited funds here for a land deal he had on with you for the N.E. $\frac{1}{4}$ sec. 9-158-86 and asked you to forward deed and abstract together with mortgage and notes for the balance of the purchase price, according to your offer made to Mr. Pollak.

To date, I have not heard from you. Kindly get the papers ready and send us so the deal can be closed.

Yours truly,
Oscar Herum, Cashier.

On March 26th, 1919, defendant wrote plaintiff as follows:

Superior, Wisconsin, March 26th, 1919.

Mr. Adolf Pollak,
Donnybrook, North Dakota.

Dear Sir:—

In regard to that land of mine near your place that you want to buy, I have to say that I recently had the abstract brought down to date and the title is all right except a big mortgage on the land not yet due. The owner of the mortgage refuses to discharge the same at this time and for that reason I cannot transfer good title. I will not undertake to do so and for that reason the deal is off. I am sending a copy of this letter to the First National Bank at Carpio.

Yours truly,
D. E. Roberts.

This constitutes the entire correspondence between the parties, and the question is whether it evidences such contract between the parties as entitles the plaintiff to specific performance.

As it is elementary that there can be no contract unless the minds of the parties have met and mutually agreed, it necessarily follows that there can be no specific performance where this requisite is lacking. In order to be enforceable in equity there must have been a clear, mutual understanding and a positive assent on both sides as to the terms of the contract; there must be a complete contract, finally concluded and agreed upon. 36 Cyc. 543, 26 Am. & Eng. Enc. Law, 21. An offer must be accepted in the terms and form submitted or there is no valid

assent, such as will create a contract which may be specifically enforced. 26 Am. & Eng. Enc. Law, 21. As was said by this court in *Beiseker v. Amberson*, 17 N. D. 215, 218, 116 N. W. 94: "It is an elementary principle in the law of contracts that an unqualified acceptance by letter in answer to an offer submitted by letter creates a binding contract in writing. It is also equally well established that any counter proposition or any deviation from the terms of the offer contained in the acceptance is deemed to be in effect a rejection, and not binding as an acceptance on the person making the offer, and no contract is made by such qualified acceptance alone. In other words, the minds of the parties must meet as to all the terms of the offer and of the acceptance before a valid contract is entered into. It is not enough that there is a concurrence of minds of the price of the real estate offered to be sold. If the purchaser adds anything in his acceptance not contained in the offer, then there is no contract. In this case there was an unqualified acceptance of the offer so far as the price is concerned. After that the acceptance advances terms by the writer as to the carrying out and execution of the contract that were in no manner contained in the offer. Among the new terms imposed by the plaintiff was the one asking the defendant to send the deed to one of two banks named in the letter. The defendant was entitled as a matter of law to have the cash price paid to him at Snohomish, Washington, where the offer was made; and without his consent he was not compelled to send the deed to any place or bank until the price was paid. If plaintiff had accepted the offer unconditionally, his right to a deed could have been made effectual only by a tender of the price to the defendant personally; and, by requiring defendant to send the deed elsewhere, a condition was attached to the acceptance which the defendant was not under any legal obligation to comply with."

In *Kvale v. Keane*, 39 N. D. 560, 9 A.L.R. 972, 168 N. W. 75, this court said: "It is also a well-settled principle of law that in thus construing such letters to constitute a contract there must be no deviation from the terms of the offer. The letter of acceptance must contain no new or different proposition, which would, to any degree, change the terms of the offer. When an offer is made as above stated, the acceptance must contain no conditions which add to the terms of the offer."

In *Ness v. Larson*, 41 N. D. 211, 170 N. W. 623, this court held

that where the owner offered to sell land, and the proposed purchaser wrote a letter accepting the offer but made the acceptance "unconditional upon owner's furnishing or paying for an abstract of title, which was a new condition not referred to in their former correspondence," such letter "was a counter offer and not an acceptance." The principle announced in the foregoing cases was applied, and such cases cited with approval, in *Carns v. Puffet*, 44 N. D. 438, 176 N. W. 93.

It seems clear that under these rules the letter written by the plaintiff on February 21st did not constitute an acceptance of the offer contained in defendant's letter of February 14th. It will be noted that in the letter of February 21st plaintiff attaches the condition that defendant must send the deed and abstract to the bank at Carpio. The letter written by the bank to the defendant in terms so states. This, of course, the defendant was under no obligation to do. Under his offer he was not obliged to furnish an abstract nor was he required to send the deed to Carpio. He was entitled to payment to him of the cash stipulated and delivery of notes and mortgage at Superior, Wisconsin.

Plaintiff, however, contends that by virtue of the deposit in the First National Bank of Carpio, he has paid the defendant \$1,800, that such moneys belong to the defendant Roberts, and that the plaintiff has no claim thereon whatever. This contention is contrary to the averments of the complaint, and the proofs. In the complaint it is averred that the "plaintiff had deposited the sum of eighteen hundred and no/100 (\$1,800) dollars in the First National Bank of Carpio, North Dakota, subject to the order of defendant, upon the furnishing of deed and abstract of title by defendant." Upon the trial the plaintiff and the cashier of the First National Bank of Carpio testified regarding said deposit, and the plaintiff introduced in evidence a receipt which he took from the bank at the time he paid over the money. The receipt reads as follows:

"Carpio, No. Dak., Feby. 20, 1919.

"Received of Adolph Pollock, \$1,800, to be paid to D. E. Roberts when said Roberts furnishes deed and abstract to N.E. $\frac{1}{4}$ -9-158-86.

"First National Bank, Carpio, N. D.

"By Oscar Herum, Cashier."

The cashier testified: "(Pollock) made this deposit of \$1,800 and I was to hold that until Mr. Roberts sent us the deed and the abstract, and the second mortgage that Mr. Pollock was to execute for the balance of the purchase price—not the second mortgage but a mortgage." He further testified that he was to hold the money until the conditions he had enumerated were performed and that until they were performed he was not to pay the money. Clearly the plaintiff did not intend, nor did the defendant have any reason to believe that plaintiff intended, the deposit to belong to the defendant. The money belonged to the plaintiff, and he could doubtless have withdrawn it at any time he saw fit to do so. He had merely placed the money in the bank with instructions to pay it over to Roberts upon Roberts' furnishing an abstract and delivering a warranty deed,—“papers satisfactory to Mr. Pollock.” In the letter of March 1st, (which it is contended is an acceptance of the counter offer), defendant apparently recognized that the money did not belong to him. He recognized that the deal was not closed,—and that it might not be closed. He said: “I have sent the abstract to be continued. As soon as I get it I will send it to the bank for you and your advisers to examine *to see if you are satisfied with my title.*” Nowhere did the defendant say that when the time came to close the deal he would send the deed to the bank at Carpio, or that he would waive his right to have the money paid to him at Superior, Wisconsin. We believe that the trial court was right in holding that these letters do not evidence a complete contract, finally concluded and agreed upon by the parties.

But even if there was a contract it does not follow that it will be specifically enforced. “The jurisdiction of a court of equity to decree the specific performance of contracts is not a matter of right in the parties to be demanded *ex debito justitiæ*, but applications invoking this power of the court are addressed to its sound and reasonable discretion, and are granted or rejected according to the circumstances of each case. Specific performance is frequently refused, although the defense is not such as would warrant rescission of the contract at the suit of the defendant.” 36 Cyc. 548.

Judgment affirmed.

ROBINSON and GRACE, JJ., concur.

BIRDZELL, J. (dissenting). I dissent. In my opinion there exists an enforceable contract for the sale of the land in question. Conceding all that is said in the majority opinion with reference to the qualified acceptance or counter-proposal of the plaintiff, it seems to me that the defendant's letter of March 1st constitutes an expression of assent to such modifications as were made by the plaintiff. At the time defendant's letter was written, it appears that he had before him both the plaintiff's purported acceptance and the letter from the bank stating the conditions attached to the deposit. He made no objection to these conditions, but, on the contrary, indicated that he would proceed with performance in the manner suggested. As I construe this letter, it served to complete a mutual contract for the sale of the land.

BRONSON, J. I concur.

ANNA STOLL and Loretta Erhart, Appellants, v. MARY GOTTBREHT and William Gottbreht, Respondents.

(176 N. W. 932.)

Public lands — right of heirs under patent.

1. Where a deceased entryman has died before final proof, and one of his heirs, claiming as a sole devisee of the land, has made final proof in behalf of the heirs, and a United States patent has issued, to the heirs of the deceased entryman, such heirs take title to the land under the patent as cotenants, and as special purchasers or donees, and not by reason of any right or interest in the estate of the deceased.

Descent and distribution — adverse claims.

2. Where a prescriptive title to land is claimed under § 5471, Comp. Laws 1913, through adverse possession and continuous payment of taxes for over ten years, by one who received a deed, subsequently lost and unrecorded, from his wife, one of the heirs of a deceased entryman, who, by will, had devised such land to such wife, and, where, upon final proof made by the wife, a United States patent is issued to the heirs of such deceased entryman, it is held:

(a) That the adverse claimant, the husband, named as an executor in the will, and knowing the nature of the title, is in the position of a cotenant with the other heirs in the land patented, and must establish affirmatively adverse and hostile possession by acts that serve to oust or dispossess the other cotenants.

(b) That the heirs having received specific bequests under the will, without knowledge of their rights, as cotenants, in the land, are not estopped to assert their titles.

Opinion filed February 19, 1920. Rehearing denied March 11, 1920.

Action to determine adverse claims in District Court, Rolette County, Buttz, J.

From a judgment in favor of the defendant, William Gottbreht, the plaintiffs have appealed and demand a trial *de novo*.

Judgment reversed and title quieted with directions.

Verret & Stormon, J. A. Capwell, and C. S. Aldrich, for appellants.

Until the will has been duly admitted to probate in the proper court it is wholly ineffectual as an instrument of title.

A will must be probated in the proper court provided by the Constitution and statutes before it is effectual or will pass title. *Honsinger v. Stewart*, 34 N. D. 513, 159 N. W. 12; *Walsh v. Krause*, 38 N. D. 264, 181 N. W. 1891; *Re Peterson*, 22 N. D. 480, 134 N. W. 751.

A will must be probated within six years after the testator's death if made known within that time. 40 Cyc. 1225, 1256; Comp. Laws 1913, §§ 8633, 8634; 57 L.R.A. 264 (note on Statutory Limitations).

There must be color of title to the real property in the persons claiming adverse possession under this statute. Comp. Laws 1913, § 5471; *J. B. Streater Jr. Co. v. Fredrickson*, 11 N. D. 300, 91 N. W. 692; *Power v. Kitching*, 10 N. D. 254, 86 N. W. 737; *Stiles v. Granger*, 17 N. D. 502, 117 N. W. 777; *Wright v. Jones*, 23 N. D. 191, 135 N. W. 1120.

L. D. Gooler and Cuthbert & Smythe, for respondents.

An unprobated will is sufficient to give color of title. 2 A.L.R. 1457; *Hitt v. Carr*, 62 Ind. App. 80, 109 N. E. 856.

BRONSON, J. Statement:—This is an action to quiet title in 160 acres of land in Rolette county, North Dakota. John Kelly made a homestead entry some three or four years before his death; he died in 1902 without having made final proof. His heirs are the defendant, Mary Gottbreht, a daughter, the defendants Frank Higgins and Frances Higgins, the husband and daughter, respectively, of a post deceased daughter, and the plaintiffs, Anna Stoll and Loretta Erhart, the

daughters of a prior deceased son. A short time before his death, this entryman made a will whereby he devised the homestead in question to the defendant, Mary Gottbreht and made other specific bequests therein, particularly, \$50 in money to be paid each of the plaintiffs. The defendant, William Gottbreht, was designated as executor of this will. He kept this will in his possession for about two or three years. He then took the will to an attorney for probate. The will was lost by the attorney; it has never been probated. After the death of the entryman, the defendants Mary Gottbreht and her husband, William Gottbreht, occupied this homestead. The defendant Mary Gottbreht later made final proof. The particular time and manner in which the same was made is not disclosed in the record. Patent was issued to the heirs of John Kelly, the entryman, on Dec. 1, 1904. From this patent, introduced in evidence, it appears that the same was issued to such heirs upon the claim of the heirs of said John Kelly having been duly established, and consummated in conformity with the law. The husband, William Gottbreht, testified that he made an agreement with his wife, Mary Gottbreht, to pay the obligations of the deceased, and to receive a deed from her of this land. That she made such deed. The deed, however, has been lost and was never recorded. He further testified that he went into possession of this land after the death of the entryman, and has farmed, or rented, it ever since. He also testified that he has paid the taxes on such land ever since 1903. Pursuant to the will, payment was made annually to the plaintiffs, of the interest, at 10 per cent, upon the bequests of \$50, amounting to \$10. Finally, in January, 1917, the bequest amounting to \$110 including interest were paid. In December, 1916, this defendant, the husband, sent quit-claim deeds covering this land for execution to each of the plaintiffs. As the plaintiff, Loretta Erhart, testified, she and her sister then first knew about this real estate. The plaintiffs, at the time of the trial, were aged twenty-three and twenty-five years, respectively; they had received the bequests, interest, and principal, mostly through their mother, being minors for many years after the decease of the entryman. Both the mother and the daughter, the plaintiff, Loretta Erhart, testify that they knew nothing about this homestead; that the money for the bequests was received under the thought that it related to personal property, under the terms of the will.

This action, accordingly, in March, 1918, was instituted by the plaintiffs, as heirs, to quiet title in their respective undivided one-sixth interests, in the land. A cause of action was also interposed, for the value of the use and occupation of the land, as against the defendant Mary Gottbreht. The defendant, William Gottbreht, interposed an answer setting up title by reason of the will, the conveyance from his wife, and his payment of the taxes, and occupancy of the premises adversely for over ten years. The defendant Mary Gottbreht in her answer alleges also the will and the sale of the land to her husband. Upon these pleadings the issues were framed. In the trial court, findings were made quieting title in fee, in the defendant William Gottbreht. From the judgment rendered thereupon, the plaintiffs have appealed and demand in this court a trial de novo.

Contentions:—The plaintiffs, the appellants herein, contend that the trial court had not original jurisdiction in the probating of a will or in receiving the proof thereof as a last will. That such unprobated will was not color of title upon which might be predicated adverse possession under the statute: That no adverse possession has been shown in the record as against these plaintiffs as heirs.

The respondents contend that proof of the lost will was used only for the purpose of establishing color of title; that otherwise it is not denied that a will must be probated. It is contended, however, that the plaintiffs were estopped by receiving the bequests so made; that the record discloses a title established through adverse possession and the payment of taxes, under color of title, pursuant to § 5471, Comp. Laws 1913.

The consideration of two legal questions, presented upon this record, determine the issues and the contentions made, viz.:

1. The nature of the title conveyed by the patent.
2. The adverse possession shown.

1. *Nature of title.*—It is apparent that when the entryman died he did not possess the title to land involved. He then possessed such rights as an entryman has before final proof. 32 Cyc. 833; 8 Fed. Stat. Anno. 2d ed. p. 562. After his decease, his heirs or devisees may complete the statutory requirements and may make final proof. U. S. Rev. Stat. § 2291, Comp. Stat. § 4532, 8 Fed. Stat. Anno. 2d ed. 558; 37 Stat. at L. 132, chap. 166, Comp. Stat. § 4563, 8 Fed. Stat. Anno. 2d ed. 45 N. D.—11.

ed. p. 614. In making such final proof, such heirs or devisees take directly from the government as special purchasers or donees, and not by reason of their right in the estate of the deceased. *Martyn v. Olson*, 28 N. D. 317, L.R.A.1915B, 681, 148 N. W. 734; *Martin v. Yager*, 30 N. D. 577, 582, 153 N. W. 286. On the face of the patent in this case, not only was proof made, evidently, in behalf of the heirs of the deceased entryman, but, the patent, in fact, was issued to such heirs.

This patent on its face carried the title to the heirs of such entryman, not to the defendant William Gottbreht, or to the defendant Mary Gottbreht, excepting her interest as heir therein, 8 Fed. Stat. Anno. 2d ed. p. 566.

The will accordingly even though valid, and duly probated, did not have the effect of transferring from the deceased entryman his title in the premises to the devisee thereof. *Gjerstadengen v. Van Duzen*, 7 N. D. 612, 66 Am. St. Rep. 679, 76 N. W. 233.

Accordingly, upon the issuance of this patent, under which title is claimed either directly or through color of title, by all of the parties to this proceeding, the title was vested in the heirs of the deceased entryman. The plaintiffs thereupon had each an undivided one-sixth interest in fee in such land. The defendant Mary Gottbreht, an undivided one-third interest therein. The heirs of such deceased entryman thereupon became and were cotenants in such land. 32 Cyc. 834, 1034.

2. *The adverse possession*.—It is deemed wholly immaterial to consider whether the claimed will constituted color of title or not. The only claim made by the respondents is that it does constitute color of title. Clearly, the title of the defendant William Gottbreht (as claimed), rests wholly, not only upon proper proof of color of title, but also upon the fundamental requisites necessary to establish title by adverse possession under the statutory provisions, which requires an actual open, adverse, and undisputed possession of land under color of title for a period of ten years, with payment of all taxes and assessments legally levied thereon. Comp. Laws 1913, § 5471. We are clearly of the opinion that the plaintiffs are not estopped to deny either the validity of the will, as title or color of title, or the sufficiency of the claimed acts of adverse possession. *Gjerstadengen v. Hartzell*, 9 N. D. 269, 274, 81 Am. St. Rep. 575, 83 N. W. 230. Nothing in the record is disclosed to show knowledge on the part of the plaintiffs, direct or

indirect, concerning their rights in this homestead, or of the acts of the defendant William Gottbreht, and his wife, in regard thereto, prior to 1916.

Upon this record it is evident, under well-established principles of law, that the defendant William Gottbreht, has not established the hostile adverse possession required under the statute. As an alleged executor of a supposed will, he had possession of this land. After the patent was issued to the heirs, he had possession of this land as a cotenant, by reason of the alleged deed made by his wife, to him.

As cotenants, the possession of one was presumed to be the possession of all. Each cotenant was entitled to the possession of such land. In order to overcome this usual presumption and to start the statute to operate by adverse holding, it was necessary for the cotenants, claiming adversely, to perform or do some act in direct hostility to the claims of his other cotenants, so as to show in some way an ouster of the rights of such cotenants. This meant such an emphatic deprivation of the rights of the cotenants, as to show either direct knowledge to the other cotenants, of such claim, or of circumstances sufficient to establish such knowledge, or the means of the knowledge thereof. *Ildvedsen v. First State Bank*, 24 N. D. 227, 235, 139 N. W. 105; *Lavin v. Kreger*, 20 S. D. 80, 104 N. W. 909. See note in 109 Am. St. Rep. 609, 623. See 38 Cyc. 27; *Reeves, Real Prop.* p. 963; *Tiffany, Real Prop.* § 168, p. 390.

However, it may be contended that this rule does not apply for the reason that the defendant Wm. Gottbreht had received a deed from his wife of the whole fee; that therefore he was in the position of an independent grantee claiming to hold in severalty, and not required to disclose or show acts of ouster other than those required of any person claiming, independently, a prescriptive title.

Upon this record, the answer is that the defendant knew full well the title of the plaintiff as cotenant of his wife; as grantee of his wife, as the holder of an unrecorded deed, and as claimed executor of the estate, he was not in a position to claim the position of an independent grantee. Then he well knew that he was, in fact, a cotenant, of the plaintiffs. Under the circumstances he still had imposed upon him the obligation, in order to assert hostile possession, to bring home to his other cotenants knowledge of his claims by such means as to con-

stitute legal knowledge to his cotenants of his hostile intentions. See *Hvedsen v. First State Bank*, supra. See *Blessett v. Turcotte*, 23 N. D. 417, 425, 136 N. W. 945; 38 Cyc. 36. See notes in *Ann. Cas.* 1915C, 1236, and 109 Am. St. Rep. 616.

This record does not disclose any attempt on the part of the defendants to give to the plaintiffs or even to their mother, who for many years was their natural guardian, any notice direct, or otherwise, of his intention to oust and deprive the plaintiffs of their undivided interest in this land. On the contrary, if any deduction is to be drawn from his actions it is to the effect that his conduct, with reference to any such information, served to keep from the plaintiffs or their mother the knowledge of the plaintiffs' actual interest in the lands involved. Such conduct secretly and clandestinely pursued by one cotenant may not thus start in operation the statute concerning adverse possession so as to deprive the plaintiffs of their title without their knowledge, even though the pretended disseisor may operate under a so-termed color of title. See *Enderlin Invest. Co. v. Nordhagen*, 18 N. D. 517, 524, 123 N. W. 390.

Upon the issues in the record herein, this court is not able to determine the rights of the parties concerning the rents and profits received from, or the value of the use and occupation of, the land. This is a matter for proceedings between cotenants for an accounting or otherwise as provided for by law. See 1 *Reeves*, Real Prop. p. 691. See *Tiffany*, Real Prop. p. 692, § 169; 38 Cyc. 63.

It is ordered that the judgment of the trial court be vacated, and that judgment be entered adjudging the plaintiffs to be, each, the owner of an undivided one sixth, and the defendant William Gottbreht, the owner of an undivided one third, right, title, and interest in fee, in the land, free from any right, title, or interest on the part of the plaintiffs, or defendants, in respect thereto. Further that the plaintiff recover costs of both courts as against the defendants Mary Gottbreht and William Gottbreht, and that such judgment so to be entered shall be without prejudice to the institution of proper proceedings concerning the rights, and profits received from, or the value of the use and occupation of, the land, between the parties as cotenants.

GRACE, J., concurs.

BIRDZELL, J., dissents.

ROBINSON, J. (concurring specially). I concur in the opinion as written by Mr. Justice Bronson; and, also, I do hold that the ten-year limitation statute under which defendant claims title, is void. The ten-year statute is chapter 158, Laws of 1899. Its title is: "An Act Relating to Titles to Real Property." That is no title at all. It is the same as an act relating to the Civil Code; or an act relating to the Criminal Code; or an act relating to personal property. It is a mere blind and it in no manner indicates that the purpose of the act was to fix a limitation of ten years in which an action may be commenced to recover real property. The act does not give to the owner of real property a day, nor a minute to commence an action after it takes effect; and if it was void when passed, it is still void as to an action commenced years after its passage. If it was void as to an action commenced on the 1st day of July after its passage, it is still void, because time does not make it valid. The decision of the court in *Power v. Kitching*, 10 N. D. 254, 88 Am. St. Rep. 691, 86 N. W. 737, is clearly wrong and it should be expressly overruled.

CHRISTIANSON, Ch. J. (dissenting). This is an action to determine adverse claims to a quarter section of land in Rolette county. The trial court found, and the evidence establishes, the following material facts:

One John Kelly entered the land in question under the homestead laws of the United States of America. On January 23, 1902, he died without having made final proof. Kelly was the father of the defendant Mary Gottbreht, and the grandfather of the plaintiffs, Anna Stoll and Loretta Erhart. Mary Gottbreht had been caring for her father for some time prior to his death. He died in her home in Rolette county. Shortly prior to his death he executed a will and testament wherein he devised the homestead to the defendant Mary Gottbreht. He also made certain bequests, among others, one of \$50 to each of the plaintiffs, with the proviso that they were to be paid interest thereon annually at the rate of 10 per cent until the principal was paid. The defendant Mary Gottbreht kept up the improvements on the land in controversy and made final proof thereon in 1902. Shortly thereafter she transferred it to her husband, William Gottbreht, by deed of conveyance. After Kelly's death the will was delivered to an attorney located at Rolla, the county seat of Rolette county, in order that he

might institute probate proceedings. No proceedings were brought, and apparently the will was lost by the attorney, who later left the state. The defendant William Gottbreht took possession of the premises under the deed. He farmed the same during the farming season of 1902, and has since remained in actual, open, and exclusive possession. He has treated the land as his own in every respect. He has, in his own name, paid all taxes and assessments levied thereon. He has made no accounting to anyone, but has retained whatever profits, and paid whatever losses, have been incident to the farming of the premises. For more than fifteen years prior to the commencement of this action he had been in possession, and in every possible manner openly and notoriously asserting title to the entire tract. It is undisputed that the two plaintiffs were each paid interest on their respective legacies at the rate of 10 per cent; that they understood that they received this as interest upon such legacies in accordance with their grandfather's will; that in January, 1917, the attorney for the defendants Gottbreht, prepared and sent quitclaim deeds to a bank in Nebraska (where plaintiffs reside), accompanied by draft for the amount of the legacies and one year's interest; that he wrote the two plaintiffs notifying them of this and requested that they call at the bank and execute the quitclaim deeds; that they called at the bank and received and cashed the draft, but refused to execute the deeds, and later brought this action.

Upon these facts the trial court concluded that the defendant—William Gottbreht is the owner of the land in question by virtue of § 5471, Comp. Laws 1913, which provides: "All titles to real property vested in any person or persons who have been or hereafter may be in actual open, adverse, and undisputed possession of the land under such title for a period of ten years and shall have paid all taxes and assessments legally levied thereon, shall be and the same are declared good and valid in law, any law to the contrary notwithstanding."

The plaintiffs appealed, and a majority of the court are of the opinion that the judgment should be reversed and the plaintiffs awarded the relief demanded in their complaint.

In the majority opinion it is said:

"The consideration of two legal questions presented upon this record determine the issues and the contentions made, viz.:

- "1. The nature of the title conveyed by the patent.
- "2. The adverse possession shown."

Upon the first proposition the majority opinion says: "When the entryman died he did not possess the title to land involved. He then possessed such rights as an entryman has before final proof. . . . After his decease, his heirs or devisees may complete the statutory requirements and may make final proof. . . . In making such final proof, such heirs or devisees take directly from the government as special purchasers or donees, and not by reason of their right in the estate of the deceased." With this statement I agree. The majority opinion continues:

"This patent on its face carried the title to the heirs of such entryman, not to the defendant, Wm. Gottbreht, or to the defendant Mary Gottbreht, excepting her interest as heir therein. 8 Fed. Stat. Anno. 2d ed. p. 566.

The will accordingly, even though valid and duly probated, did not have the effect of transferring from the deceased entryman his title in the premises to the devisee thereof. *Gjerstadengen v. Van Duzen*, 7 N. D. 612, 66 Am. St. Rep. 679, 76 N. W. 233.

Accordingly, upon the issuance of this patent, under which title is claimed, either directly, or through color of title, by all of the parties to this proceeding, the title was vested in the heirs of the deceased entryman. The plaintiffs thereupon had each an undivided one-sixth interest in fee in such land. The defendant Mary Gottbreht an undivided one-third interest therein. The heirs of such deceased entryman thereupon became and were cotenants in such land."

I do not agree with the majority members as to the effect which they attribute to the fact that the patent was issued to "the heirs of John Kelly."

Section 2291, U. S. Rev. Stat., Comp. Stat. § 4532, 8 Fed. Stat. Anno. 2d ed. p. 557, provides that after the expiration of the prescribed time "the person making such entry, or if he be dead, his widow, or, in case of her death, his heirs or devisee," upon proper proof being submitted, shall be entitled to a patent as in other cases provided by law.

Section 2292, U. S. Rev. Stat., Comp. Stat. § 4533, 8 Fed. Stat. Anno. 2d ed. p. 571, gives a priority in favor of infant children, in case

both father and mother are dead. The two sections were construed by the Supreme Court of the United States in *Bernier v. Bernier*, 147 U. S. 242, 37 L. ed. 152, 13 Sup. Ct. Rep. 244. According to that decision, the rights to the homestead of a deceased entryman accrue in the following order:

First, to the widow, if there be one; second, to the minor children, and, if the children are partly minors and partly adults, then in equal shares to each without regard to minority; third, to the devisee, if there be one; fourth, to the heirs. *Hays v. Wyatt*, 19 Idaho, 544, 552, 32 L.R.A.(N.S.) 397, 115 Pac. 13.

In the case of *Re Dodge*, 1 Land Dec. 47, the Commissioner of the General Land Office ruled that "the devisee of a homestead claimant is entitled to all the privileges that would descend to the heirs." See also, *Allsop v. Dumas*, 2 Land Dec. 82; *Winters v. Jordan*, 2 Land Dec. 85; *Eberhardt v. Selich*, 33 Land Dec. 342. In *Eberhardt v. Selich*, supra, the entryman devised his homestead to the Evangelical Lutheran Zions Church, of which congregation he was a member, with directions that at the expiration of a period of twelve years the land should be turned over to the Missionary Board of the Synod of Ohio and other states, and that said board should then become the owner of the land. In an exhaustive opinion the Secretary of the Interior sustained the rights of the devisee.

The Land Department has repeatedly ruled that it will not attempt to determine what heirs or devisees, or whether heirs or devisees, are entitled to the land. In the case of *Re Eustance*, 40 Land Dec. 628, patent had been issued generally to the heirs of the deceased entrywoman. Subsequently an application was made for a cancelation of the patent issued, and for the issuance of a new patent to one Matilda Peterson, as devisee. The application was accompanied by the patent, a certified copy of the will, and a deed reconveying the land to the United States. In denying the application the Secretary of the Interior said: "It is clear, therefore, that the department would have no authority to cancel the patent upon the present showing, *and it would decline to cancel it upon any showing, as such action would involve an adjudication and finding as to who the heirs are, which the department declines to undertake.* It would still be necessary, even if the old patent were canceled and a new one issued to the heirs or devisees, to

resort to court procedure for determination as to the proper claimant, or claimants, under the patent and their respective interests. It is suggested that the proper procedure for the petitioner is, in case she claims to be the sole and only proper claimant of the land involved, to file a bill in equity in the proper local court to have the title declared vested in her."

And when patent was issued for the land involved in *Eberhardt v. Selich*, 33 Land Dec. 342, wherein the rights of the devisee had been sustained in a contest proceeding, the department refused to issue patent to the devisee, and issued patent, following the language of the statute, to "the heirs or devisees of Julius Selich."

This policy of the Land Department has been recognized by the different courts that have had occasion to consider the matter. See *Hays v. Wyatt*, *supra*; *Cole v. Cole*, 98 Neb. 674, 154 N. W. 248; *Anderson v. Muhr*, 36 Okla. 184, 128 Pac. 296. See also *Theisen v. Qualley*, 42 S. D. 367, 175 N. W. 556.

In *Cole v. Cole*, 98 Neb. 674, 154 N. W. 248, the entryman made a will, whereby he devised his homestead to his son. The son later made final proof, and obtained a patent running to "the heirs of Eleazor Cole." In making proof he failed to present the will or call the attention of the officials of the Land Department to the fact that a will had been made. Later the son, who had been named as devisee in such will, brought an action to quiet title to the land, naming the other heirs of the decedent as parties defendant. The supreme court of Nebraska held: "The fact that when the devisee applies for a patent he fails to present the will of the decedent to the Land Department will not, in the absence of a plea and proof of facts constituting an estoppel, defeat his right to have his title quieted in the proper local court."

Under the Federal statutes, and the decisions interpretative thereof, the following propositions are established:

(1) An entryman, who, at the time of his death, has neither wife nor minor children, may devise his homestead.

(2) Where an entryman dies, and final proof is made either by an heir or a devisee the Land Department will not attempt to determine what heir or heirs, or devisee or devisees, or whether heirs or devisees are entitled to the land. Patent will be issued either to the heirs generally, or to the heirs or devisees of the deceased, leaving to the local

courts to identify the parties and determine their respective interests.

(3) Where an entryman, who has neither wife nor minor children, devises his homestead, the patent inures to the benefit of the devisee only.

(4) Neither the heirs nor the devisees take by virtue of the law of the state where the land is located. They take by virtue of the Federal statutes as successors of the original entryman. The patent issued by the Land Department whether issued to the heirs generally or to the heirs or devisees inures to the benefit of, and vests title, in the person or persons named in the Federal statute.

Clearly no inference, adverse to the plaintiff, can or should be drawn in this case from the fact that the patent is issued generally to the heirs of John Kelly. The patent by virtue of the Federal statute inured to the benefit of the person named in such statute as successor of the entryman, and vested the title in such person. If there was a devisee the patent inured to the benefit of such devisee. For, as was said by the South Dakota supreme court in *Theisen v. Qualley*, supra, "there can be no heirs where there is a devisee."

The trial court found, and the majority opinion also finds, that John Kelly made a will whereby he devised his homestead to his daughter, Mary Gottbreht. It is true the will was never probated. But the question here is not whether there was a valid will, but whether the will and the deed executed by Mary Gottbreht to her husband, William Gottbreht, gave a color of title upon which his claim of title by adverse possession under § 5471, Comp. Laws 1913, may rest. Color of title has been said to be "that which gives the semblance or appearance of title, but is not title in fact; that which, on its face, professes to pass title, but fails to do so because of want of title in the person from whom it comes or the employment of an ineffective means of conveyance." 1 R. C. L. p. 707. "If an instrument actually passes the title, it is clear that it is not 'color of title.' The term implies that a valid title has not passed." 1 R. C. L. p. 707. In *Power v. Kitching*, 10 N. D. 254, 88 Am. St. Rep. 691, 86 N. W. 737, this court held that a tax deed void on its face constituted color of title under the statute. In *Petit v. Black*, 13 Neb. 142, 12 N. W. 841, the supreme court of Nebraska held that a will which had not been admitted to probate, and hence was inadmissible as evidence of, and ineffectual to pass, title

to real estate, was nevertheless sufficient as a claim of right upon which a title by adverse possession might be predicated. It is generally held that a deed which purports to convey title will give color of title, although it be not acknowledged, or although it be defectively acknowledged. 2 C. J. 181. And in the absence of any statute expressly or impliedly providing otherwise, an unregistered deed will give color of title. *Ibid.* So will a lost deed, which is proved to have been executed and delivered. 2 C. J. 191.

"In order that a deed may give color of title it is not necessary that the grantor should have had title either to the whole or to any part of the land conveyed, unless there is some statute from which this requirement may be inferred. A deed from a mere volunteer is good color of title. A title founded on adverse possession under a deed which purports to convey the title is wholly independent of prior conveyances or of the grantor's actual title." 2 C. J. 184, § 351. "Where real estate is held in common, and one tenant assumes to convey the entire estate and does convey it by metes and bounds, the deed will give color of title as to the whole tract, and an entry by the purchaser thereunder claiming title to the whole will operate as an actual ouster and disseisin of the cotenant." 2 C. J. 185, § 355. See also *Unger v. Mooney*, 63 Cal. 586, 49 Am. Rep. 100; *Lloyd v. Mills*, 68 W. Va. 241, 32 L.R.A. (N.S.) 702, 69 S. E. 1094; *Gardiner v. Hinton*, 86 Miss. 604, 109 Am. St. Rep. 726, 38 So. 779.

It seems to me that the instruments under which the defendant William Gottbreht entered into and has remained in possession of the premises, gave him sufficient color of title upon which to build a claim of ownership by adverse possession under § 5471, *supra*.

But the majority members say that in any event no adverse possession has been shown. This holding is predicated upon the promise that the defendants originally entered into possession of the premises in controversy as cotenants of the plaintiffs. The majority members arrive at their conclusion by applying the rules applicable to a case where one who has originally entered into, and remained in, possession of premises as a tenant in common, seeks to assert title by adverse possession against his former cotenants. Of course in such case he is presumed to continue in possession in the same character in which he originally entered, and his possession does not become adverse unless

and until he does something which in effect amounts to an ouster of his cotenants. But the defendants in this case did not enter into possession of the premises with the understanding that they were cotenants of the plaintiffs or of anyone else. No one can doubt that the defendants have all the time supposed that they were the sole owners of the premises. They entered into possession as owners. From the outset they claimed the whole estate. They never for a moment supposed or recognized that the plaintiffs had any interest in the land. They knew that John Kelly had devised the land to his daughter Mary Gottbreht. They assumed that upon complying with the law and obtaining title from the United States government she would and did become the absolute owner of the land free of all claims on the part of any of the heirs. Mary Gottbreht assumed that she was the sole owner of the premises when she conveyed the tract to her husband. He assumed that he took a fee-simple title to the whole tract. From the moment of the original entry, the possession of each of the defendants was antagonistic to the claims of the plaintiffs or any of the other persons claiming to be heirs of John Kelly. And since the entry, every moment of occupancy has been a continual assertion of exclusive ownership of the premises.

In these circumstances I believe that the trial court was right in holding that the defendant William Gottbreht had been in adverse possession of the premises from 1902; and that the title which he claimed had ripened and might be asserted against the plaintiffs. See Ann. Cas. 1915C, p. 1236; 1 Cyc. 1078, 1079; Parker v. Merrimack River Locks & Canals, 3 Met. 91, 37 Am. Dec. 121; Dubois v. Campau, 28 Mich. 304; Fuller v. Swensberg, 106 Mich. 305, 58 Am. St. Rep. 481, 64 N. W. 463. See also Beitz v. Buendiger, 144 Minn. 52, 174 N. W. 440; Hahn v. Keith, 170 Wis. 524, 174 N. W. 551; Theisen v. Qualley, 42 S. D. 367, 175 N. W. 556.

BIRDZELL, J., concurs.

FARWELL, OZMUN, KIRK, & COMPANY, a Corporation, et al.,
Appellants, v. GEORGE E. WALLACE, as Tax Commissioner of
the State of North Dakota, et al., Respondents.

(177 N. W. 103.)

Taxation — moneys and credits' tax construed.

1. Chapter 230 of the Session Laws of 1917, which imposes an annual tax of three mills on each dollar of the cash value of moneys and credits, is not applicable to moneys and credits arising out of interstate commerce transactions of the plaintiffs, who are foreign corporations not engaged in doing an intrastate business.

Taxation — situs of property for taxation.

2. Chapter 229 of the Session Laws of 1919, which fixes the situs of property for purposes of taxation, and thus defines the taxing jurisdiction of the state, does not operate to render taxable the moneys and credits of the plaintiffs which are derived from interstate commerce in the manner stated in the opinion.

Taxation — excise tax on capital stock and bonds of foreign corporations not applicable to corporations engaged solely in interstate commerce.

3. Chapter 222 of the Session Laws of 1919, which provides, among other things, for an excise tax on capital stock and bonds of foreign corporations engaged in business within this state during the previous calendar year, is construed and held not applicable to corporations engaged solely in interstate commerce.

Opinion filed March 13, 1920.

Appeal from district court of Burleigh County, *J. M. Hanley*, Special Judge.

Reversed and remanded.

Butler, Mitchell & Doherty (*Miller, Zuger & Tillotson*, of counsel), for appellants.

The credits, whether secured or unsecured, owing to the plaintiffs from debtors residing in North Dakota, have no taxable situs in North Dakota and are beyond the taxing power of the state, and in so far as

NOTE.—Authorities discussing the question of situs, as between different states or countries, of personal property for purposes of property taxation, are collated in a note in L.R.A.1915C, 903.

the laws attempt to impose such a tax they are in violation of the due process clause and the contract clause of the Federal Constitution. *State Tax on Foreign-Held Bonds*, 15 Wall. 300; *Walker v. Jack*, 88 Fed. 576; *New Orleans v. Stempel*, 175 U. S. 309; *Bristol v. Washington County*, 177 U. S. 133; *Metropolitan L. Ins. Co. v. New Orleans*, 205 U. S. 395; *Liverpool, L. & G. Ins. Co. v. New Orleans Assessors*, 221 U. S. 346.

Plaintiff corporations are engaged exclusively in interstate commerce and the credits which they own arise out of the business of interstate commerce. The state of North Dakota has no power to exclude them from this business and the business is not transacted within the state of North Dakota. *Buck Stove Co. v. Vickers*, 226 U. S. 205; *Sioux Remedy Co. v. Cope*, 235 U. S. 197; *Sucker State Drill Co. v. Wirtz Bros.* 115 N. W. 844.

The transaction of business within the meaning of the statute means any local business and does not include interstate business one end of which was in North Dakota. See also *M. E. Smith Co. v. Dickenson*, 142 Pac. 1133; *Vermont Farm Machinery Co. v. Hall*, 80 Or. 308, 156 Pac. 1073; *Butler Bros. Shoe Co. v. United States Rubber Co.* 156 Fed. 1; *Underwood Typewriter Co. v. Piggott (W. Va.)* 55 S. E. 664; *Lehigh Portland Cement Co. v. McLean (Ill.)* 92 N. E. 248; *Mutual Mfg. Co. v. Alspaugh (Ind.)* 91 N. E. 504; *Western U. Teleg. Co. v. Kansas*, 216 U. S. 1.

The state courts have uniformly followed the rule that credits held by a nonresident creditor owing from a resident debtor are not taxable within the state of debtor's domicile, unless they arise out of business done within that state. *Grant v. Jones*, 39 Ohio, 506; *State v. Smith (Miss.)* 8 So. 294; *Goldgart v. People*, 106 Ill. 25; *Senour v. Ruth (Ind.)* 39 N. E. 946; *Holland v. Board of Comrs. (Mont.)* 39 Pac. 575; *Arapahoe Co. v. Cutler*, 3 Colo. 349; *Re Jefferson*, 35 Minn. 215; *State v. Scottish-American Mortg. Co.* 76 Minn. 155.

"A debt due a nonresident of this territory from a resident of this territory, although secured by a mortgage upon real estate situated in this territory, is not subject to taxation in this territory." *Holland v. Board of Comrs.* 39 Pac. 575; *Adams v. Colonial U. S. Mortg. Co.* 34 So. 482; *Jack v. Walker*, 96 Fed. 578, affirmed in 100 Fed. 1006; *Hathaway v. Edwards*, 85 N. E. 28; *Commonwealth v. Peebles*, 119

S. W. 774; National Fire Ins. Co. v. Assessors, 46 So. 117; General Electric Co. v. Assessors, 46 So. 122; Board of County Comrs. v. Cutler, 3 Colo. 351; Goldgart v. People, 106 Ill. 29; Firesman v. Byrns, 69 Ind. 254.

An attempt of a state to tax property beyond the confines of the state or not subject to its jurisdiction, constitutes the taking of property without due process. *Looney v. Cranee Co.* 245 U. S. 178, 187; *Western U. Teleg. Co. v. Kansas*, 216 U. S. 1.

The provision of the law that under such circumstances, the tax should be deducted by the debtor operates to impair the obligation of contracts. *State Tax on Foreign-Held Bonds*, 15 Wall. 300.

Taxation of these credits amounts to an unlawful burden on interstate commerce. *Reading R. R. v. Pennsylvania*, 15 Wall. 242; *Reading R. R. v. Pennsylvania*, 15 Wall. 284; *Fargo v. Michigan*, 121 U. S. 230; *Philadelphia & S. S. S. Co. v. Pennsylvania*, 122 U. S. 326; *Galveston, H. & S. R. Co. v. Texas*, 210 U. S. 217; *U. S. Exp. Co. v. Minnesota*, 223 U. S. 335; *May v. New Orleans*, 178 U. S. 496.

The state of North Dakota has no power to impose a capital stock tax on the plaintiffs by reason of their transacting interstate commerce business or on account of or based upon credits having no situs in this state. *Provident Sav. Asso. v. Kentucky*, 239 U. S. 103.

William Langer, Attorney General, and *F. E. Packard*, Assistant Attorney General, for respondents.

BIRDZELL, J. This is an appeal from a judgment of dismissal entered pursuant to an order sustaining a demurrer to the complaint. The action is one brought by a number of plaintiffs who are foreign corporations against the defendants, the Tax Commissioner, the Attorney General, and all of the county auditors of the state, to enjoin them from listing for purposes of taxation open accounts and promissory notes owned by plaintiffs, arising out of business transacted in a manner hereinafter to be described, and from attempting to tax the plaintiffs on account of such accounts or notes and from levying any capital stock tax upon plaintiffs by reason of the transaction of business in this state. They also ask that the defendants be restrained from requiring plaintiffs to make returns and from imposing penalties for failure to report. Also that defendants be restrained from requiring debtors of the cor-

porations residing in this state to make returns and deduct any such tax from the amount of indebtedness, or to impose any penalties for the failure of debtors to do so. In short, the action is one to prevent the enforcement of certain statutes which, as construed by the defendants, render the plaintiffs liable to certain taxes on account of business transacted in the following manner as alleged in the complaint:

The plaintiffs, being foreign corporations having their offices and places of business in the cities of St. Paul, Minneapolis, and Duluth, Minnesota, are engaged in selling various classes of merchandise at wholesale to persons, firms, and corporations in North Dakota and other northwestern states. It is not their custom to distribute their goods from depots and warehouses within this state nor to have resident agents other than traveling salesmen. The latter transmit orders generally from the place where received to the places of business of the plaintiff corporations in Minnesota. The orders, from which business results, are accepted in Minnesota and the merchandise is shipped into this state. The purchase price is payable in Minnesota and the sales are made according to a custom, which prevails in the wholesale business, under which the accounts are considered as due within thirty to ninety days from the date of invoice, with discount for earlier payments. Accounts that are not paid when due are treated as delinquent, and it occasionally happens that promissory notes are received in settlement, which notes may or may not be secured by mortgages on North Dakota property.

The acts being done and threatened by the defendants, which the plaintiffs desire to have them restrained from performing, are justified under legislative enactments which provide in substance as follows: An act, approved March 9, 1917 (Sess. Laws 1917, chap. 230), exempts money and credits from other taxation to which it had theretofore been subject, and imposes an annual rate thereon of three mills on each dollar of the cash value. By an act approved March 6, 1919 (Sess. Laws 1919, chap. 229), the situs law, which was construed by this court in the case of *State ex rel. Langer v. Packard*, 40 N. D. 182, 168 N. W. 673 (Sess. Laws 1917, chap. 229), was amended in several respects, but for the purposes of this case it need only be noted that the amendment changed the criterion of taxability or situs. The transaction of business within this state was no longer the test as in the 1917 law.

Under the amended act of 1919, the intent and purpose is declared to be that "all property or interest in property within the state, or income, or profit derived therefrom, shall be subject to all the taxes imposed by the laws of the state" whether the owner or recipient thereof reside within the state or elsewhere. In furtherance of this declared intent, it is provided that property, including both credits and shares of stock and bonds of corporations, is taxable at the residence of the holders of the obligations within this state, if such residence there be; and, if not, that the tax shall be deductible in the hands of the debtor or his agent or the agent of the creditor within the state. For listing purposes, though apparently not for enforcement purposes, the situs of the tangible property held as security for debts is also recognized. The tax, however, is made a first lien upon the property upon which the credit is secured.

Under an act approved March 7, 1919 (Sess. Laws 1919, chap. 222), such foreign corporations as have been engaged in business in this state during the previous calendar year are required to pay an annual special excise tax equal to 50 cents on each \$1,000 of the capital "actually invested in the transaction of business in the state."

At a special session of the legislature held in December, after this case was submitted, the laws referred to above were repealed or changed as follows: Under chapter 62 of the Laws of the Special Session, moneys and credits are declared to be exempt from taxation, except the income tax. Stocks and bonds, however, remain subject to the operation of chapter 222 of the Laws of 1919. Chapter 255 of the Laws of 1915 (the original moneys and credits law, held invalid in *State ex rel. Linde v. Packard*, 32 N. D. 301, 155 N. W. 666) and chapter 230 of the Laws of 1917, as amended by chapter 226 of the Laws of 1919, are expressly repealed. (Chapter 226 of the Laws of 1919 relates to investigation and listing by the attorney general and is not germane to any question here involved.) By § 2 of the repealing act, however (chapter 62 of the Laws of Special Session), it is provided that taxes theretofore levied under any of the tax laws of this state shall not be invalidated or discharged.

By chapter 68 of the Session Laws of the Special Session of 1919, the situs law was again amended. Having repealed the laws for the taxation of moneys and credits, it was apparently thought desirable to

45 N. D.—12.

amend the situs statute so as to make the criterion the location of the property or of the place of business of the taxpayer, for obviously the provisions of the 1919 situs law relating to the domicile of the *debtor* or his *agent* could only be appropriate or applicable in the administration of a tax on credits. However, it was provided here also that the validity of taxes assessed under the former situs law should not be affected.

From the foregoing statement it will be seen that most of the laws justifying the alleged objectionable procedure by the defendants are repealed. As to such laws as are repealed, therefore, we do not feel called upon to express our views at length and shall content ourselves with the mere statement of the conclusions at which we have arrived.

First, chapter 230 of the Laws of 1917, which taxes moneys and credits at three mills on the dollar, does not, in our opinion, embrace such moneys as are the proceeds of sales constituting a part of interstate commerce, nor the temporary credit of thirty to ninety days on invoices which, in the business world, is regarded as a cash transaction if paid within the time stated. The transactions from which such moneys and credits arise are interstate in character and as such free from any revenue burdens imposed or sought to be imposed by the state. *Western U. Teleg. Co. v. Texas*, 105 U. S. 460, 26 L. ed. 1067; *Robbins v. Taxing Dist.* 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; *Asher v. Texas*, 128 U. S. 129, 32 L. ed. 368, 2 Inters. Com. Rep. 241, 9 Sup. Ct. Rep. 1; *Stoutenburgh v. Hennick*, 129 U. S. 141, 32 L. ed. 637, 9 Sup. Ct. Rep. 256; *International Textbook Co. v. Pigg*, 217 U. S. 91, 54 L. ed. 678, 27 L.R.A.(N.S.) 493, 30 Sup. Ct. Rep. 481, 18 Ann. Cas. 1103.

We are mindful of the fact that proceeds from interstate business may, under the decisions, be resorted to for the purpose of measuring a tax which does not purport to be levied directly upon the interstate business, such as an occupation tax (*Ficklen v. Taxing Dist.* 145 U. S. 1, 36 L. ed. 601, 4 Inters. Com. Rep. 79, 12 Sup. Ct. Rep. 810), or a tax in the nature of a franchise tax (*Adams Exp. Co. v. Ohio State Auditor*, 165 U. S. 194, 41 L. ed. 683, 17 Sup. Ct. Rep. 305, and 166 U. S. 185, 41 L. ed. 965, 17 Sup. Ct. Rep. 604). But the tax in this case is not of that character. It is levied directly upon the proceeds of interstate business; and, regardless of the form or character of the tax denominated in the statute, it, in fact, imposes a direct burden upon

interstate commerce. *LeLoup v. Mobile*, 127 U. S. 640, 32 L. ed. 311, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380. Tangible property which is being used in interstate commerce, when actually present within a state, may have a situs there for purposes of taxation; but, to use a somewhat metaphorical expression, it does not acquire a situs until it becomes mingled with the general property in the state. *Brown v. Houston*, 114 U. S. 622, 29 L. ed 57, 5 Sup. Ct. Rep. 1091. *Pittsburg & S. Coal Co. v. Bates*, 156 U. S. 577, 39 L. ed. 538, 5 Inters. Com. Rep. 30, 15 Sup. Ct. Rep. 415; *Kelley v. Rhoads*, 188 U. S. 1, 47 L. ed. 359, 23 Sup. Ct. Rep. 259; *Gray, Limitations of Taxing Power*, §§ 918 to 923.

The property in question is intangible in character and there is therefore lacking the element of physical situs which always lends a degree of support to the attempted exercise of jurisdiction. In so far as the domicile of the debtor affects the situs of intangible property, it will be mentioned under our second conclusion. For the reasons stated, we are of the opinion that this property did not acquire a domestic situs so as to be subject to an ad valorem, money or credit tax at a flat rate.

Second, as to that portion of the credits due to the plaintiffs which represents past-due accounts evidenced by promissory notes and secured by mortgages upon North Dakota property, our conclusion is that the property does not have a legal situs in North Dakota for purposes of such a tax. See *State Tax on Foreign-held Bonds*, 15 Wall. 300, 21 L. ed. 179. We are aware of the fact that the broad doctrine of the case cited is somewhat restricted by other decisions unnecessary to be referred to here, at length, but the restrictions appear to be based upon some element in the situation,—other than the bare fact of the residence or domicile of the debtor,—which has a legitimate bearing upon the question of situs; as, for instance, the presence within the state of a certain amount of revolving business capital in the hands of a resident agent (see *New Orleans v. Stempel*, 175 U. S. 309, 44 L. ed. 174, 20 Sup. Ct. Rep. 110; *Metropolitan L. Ins. Co. v. New Orleans*, 205 U. S. 395, 51 L. ed. 853, 27 Sup. Ct. Rep. 499; *Liverpool & L. & G. Ins. Co. v. Board of Assessors*, 221 U. S. 346, 55 L. ed. 762, L.R.A. 1915C, 903, 31 Sup. Ct. Rep. 550); or where the segregation of the interests of mortgagor and mortgagee in tangible property, taxing the interest of each separately and of neither doubly. *Savings & L. Soc. v.*

Multnomah County, 169 U. S. 421, 42 L. ed. 803, 18 Sup. Ct. Rep. 392. These elements are not present in the instant case as, under the facts alleged, the sole basis for the attempt to tax the credits referred to is the presence within the state of the debtor or of the tangible property upon which security is given.

Third, as to the capital stock tax: Chap. 222, Sess. Laws 1919, which provides for this tax, has not been repealed. The acts sought to be restrained are justified under subdivision 2 of § 1 of this chapter. This subdivision authorizes the levy of a special excise tax on the shares of stock and bond issues of foreign corporations falling within its scope. The scope can be best understood by referring to the language of the statute itself. The statute reads:

"(2) Every corporation, joint stock company, or association, now or hereinafter organized under the laws of any other state, the United States or a foreign country, and engaged in business in the state during the previous calendar year, shall pay annually a special excise tax with respect to the carrying on or doing of business in the state by such corporation, joint stock company, or association equivalent to 50 cents for each \$1,000 of the capital actually invested in the transaction of business in the state."

Further provision is made for allocation of the taxable stocks and bonds according to the proportion of business within the state compared to the total business of the corporation.

The question for our consideration is whether or not foreign corporations who transact business within this state and only in the manner described are liable for the tax. Liability, under the statute, depends upon whether the corporation has been "previously engaged in business within the state." For the reasons briefly stated in this opinion and stated more at length in the opinion of this court in *State ex rel. Langer v. Packard*, 40 N. D. 182, 168 N. W. 673, and in the opinion of the writer in the case of *Dahl Implement & Lumber Co. v. Campbell*, post, 239, 178 N. W. 197, we are of the opinion that the plaintiff corporations were not transacting business within the state so as to be rendered subject to the tax. We may properly add that, in our opinion, this tax is applicable only to such foreign corporations as have actually transacted domestic business within the state, and is not necessarily to be applied to all that have merely satisfied the requirements of §§ 5238 to 5240.

Comp. Laws 1913, by the payment of a nominal fee and the appointment of the secretary of state as attorney upon whom process may be served. A foreign corporation might well choose to take this step as a precautionary measure to avoid any possible question as to the validity of its contracts, for compliance is not burdensome, while the penalty for noncompliance is rigorous, entirely depriving the noncomplying corporation of remedy on the contract. Comp. Laws, 1913, § 5242.

It follows that the judgment appealed from is erroneous and it is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

GRACE, J. (concurring in result). The laws mentioned in the case of Capital Trust & Sav. Bank v. Wallace, post, 182, 177 N. W. 440, as having been repealed, with the exception of chap. 222 of the Laws of 1919, which are the same laws involved in this case, and by reason of the repeal of such laws, as above mentioned, and the reasons stated in my opinion, in the case of Capital Trust & Sav. Bank v. Wallace, I concur in the result arrived at by the opinion of the court, but do not concur in all the reasoning contained in such opinion, by which the result is reached.

STATE OF NORTH DAKOTA EX REL. FARWELL, OZMUN,
KIRK, & COMPANY, a Corporation, et al., Relators, Plaintiffs,
v. GEORGE E. WALLACE, as Tax Commissioner of the State
of North Dakota, et al., Defendants.

(177 N. W. 106.)

Controlled case.

This case is controlled by the case of Farwell, Ozmun, Kirk, & Company v. Wallace, ante, 173, 177 N. W. 103.

Opinion filed March 13, 1920.

Original proceeding.
Writ denied.

Butler, Mitchell, & Doherty (Miller, Zuger & Tillotson, C. J. Rockwood, and Washburn, Bailey & Mitchell, of counsel), for relators.

William Langer, Attorney General, F. E. Packard, Assistant Attorney General, for respondents.

PER CURIAM: This is an original application asking at the hands of this court the same relief sought in an action of the same title which was begun in district court, and which is disposed of on appeal under the same title, being No. 3811 upon the calendar of this court, ante, 173, 177 N. W. 103. The opinion in that case is decisive of the issues presented upon the petition. Though, for the reasons stated in the opinion referred to, the plaintiffs are entitled to the relief sought, it will not be granted in this original proceeding as full relief can be obtained in the proceeding brought in district court.

BRONSON, J., concurs in the result.

GRACE, J. (concurring in result). The laws mentioned in the case of Capital Trust & Sav. Bank v. Wallace, *infra*, 177 N. W. 440, as having been repealed, with the exception of chap. 222 of the Laws of 1919, which are the same laws involved in this case, and by reason of the repeal of such laws, as above mentioned, and the reasons stated in my opinion, in the case of Capital Trust & Sav. Bank v. Wallace, I concur in the result arrived at by the opinion of the court, but do not concur in all the reasoning contained in such opinion, by which the result is reached.

CAPITAL TRUST & SAVINGS BANK, a Corporation, et al., Appellants, v. GEORGE E. WALLACE, as Tax Commissioner of the State of North Dakota et al., Respondents.

(177 N. W. 440.)

Taxation — moneys and credits tax — does not apply to foreign corporations not doing business in the state.

Chapter 230 of the Session Laws of 1917, which provided for the taxation of moneys and credits at an annual flat rate of three mills on each dollar of the cash value, having been repealed by chapter 63 of the Session

Laws of the Special Session of 1919, the latter providing that the act should not be construed to invalidate or discharge any tax theretofore levied or assessed, it is held that the plaintiffs, in respect to the business described in the complaint, are not liable for the tax sought to be imposed.

Opinion filed March 13, 1920.

Appeal from District Court, Burleigh County, *J. M. Hanley*, Special Judge.

Reversed.

Butler, Mitchell & Doherty (*Miller, Zuger & Tillotson*, of counsel), for appellants.

The court has jurisdiction to entertain this cause and decide the matters in controversy. *State v. Packard*, 32 N. D. 301, 105 N. W. 666; *State v. Taylor*, 33 N. D. 76, 156 N. W. 561; *State v. Hall*, 35 N. D. 34, 155 N. W. 281; *State v. Packard*, 35 N. D. 298, 160 N. W. 150; *State v. Packard*, 168 N. W. 673.

The notes held by the relators, although secured by mortgages on North Dakota real or personal property, are not subject to taxation in North Dakota. *State Tax on Foreign-held Bonds*, 15 Wall. 300; *Walker v. Jack*, 88 Fed. 576; *New Orleans v. Stempel*, 175 U. S. 309.

"A debt due a nonresident of this territory from a resident of this territory, although secured by a mortgage upon real estate situated in this territory, is not subject to taxation in this territory." *Territory v. Delinquent Tax Lists*, 24 Pac. 182; *State v. Scottish Am. Stg. Co.* 76 Minn. 155; *Holland v. Board of Comrs.* 39 Pac. 575; *Adams v. Colonial & U. S. Mortg. Co.* 34 So. 482; *Jack v. Walker*, 96 Fed. 578, affirmed in 100 Fed. 1006; *Hathaway v. Edwards*, 85 N. E. 28; *Com. v. Peebles*, 119 S. W. 774; *National Fire Ins. Co. v. Board of Assessors*, 46 So. 117; *General Electric Co. v. Board of Assessors*, 46 So. 122; *Board of County Comrs. v. Cutler*, 3 Colo. 351; *Goldgart v. People*, 106 Ill. 29; *Firesman v. Byrns*, 69 Ind. 254; *Com. v. Consolidated Casualty Co.* 185 N. W. 508.

"Where the nonresident lender has no place of business or location or agent in the state, and accomplishes the loan beyond the limits of this state, the fact that negotiations for the loan were made by persons in this state, and it was secured by mortgage on property in this state,

does not subject it to taxation here." *State v. Smith*, 8 So. 294; *Goldgart v. People*, 106 Ill. 25; *Senour v. Ruth*, 39 N. E. 946.

"The debt, therefore, if owned and controlled by one not a resident of the state, is not 'property in the state subject to taxation' as provided by the Revenue Act of 1891, but can be assessed only at the domicile or place of residence of the creditor without regard to the domicile of the debtor." *Holland v. Silver Bow County*, 39 Pac. 575.

Wm. Langer, Attorney General, and *F. E. Packard*, Assistant Attorney General, for respondents.

BIRDZELL, J.: This is an appeal from a judgment in favor of the defendants which was entered pursuant to an order sustaining a demurrer to a complaint. The action is one to enjoin the defendants from proceeding under certain tax laws to tax credits evidenced by promissory notes and mortgages owned by the plaintiffs on April 1, 1919. The plaintiffs allege that they are foreign corporations having their offices and places of business in the cities of St. Paul and Minneapolis, Minnesota; that the business of each of them consists in loaning money on promissory notes secured by mortgages on farm lands and, as to one plaintiff, by chattel mortgages on live stock; that on April 1, 1919, they held a large amount of such notes and mortgages; that none of the plaintiffs has established any place of business within the state of North Dakota nor has any office in this state; that loans have been made by them substantially in the following manner: Persons or corporations living within this state and engaged in the banking, loan, or real estate business, take applications for loans, submit them to the plaintiffs for consideration, and, if satisfactory to the plaintiffs, the loan is completed. The loan broker in North Dakota, to whom the application was made, attends to the execution of the necessary papers which are sent by him to the plaintiffs for their examination and approval. Upon approval, the money is forwarded by the plaintiffs to the loan broker, or, in some instances, deposited in Minnesota banks to the credit of the broker. The brokers receive their commissions from the borrower and act as his representative. The plaintiffs keep their notes and mortgages at their offices outside the state and that they keep no fund within the state for investment. Another method of acquiring securities is the purchase from banks or persons engaged in the mortgage loan

business. The methods according to which the various plaintiffs handle loans on North Dakota property differ to some extent. Some make loans exclusively in the manner hereinbefore described at length; others may mingle both that method and the purchase method; and still others acquire loans exclusively by purchase.

It will be noted that the facts stated above are substantially the same as the facts presented in *State ex rel. Langer v. Packard*, 40 N. D. 182, 168 N. W. 673.

The history of the legislation bearing upon the tax sought to be enforced against the plaintiffs is stated in full in the opinion of this court, filed concurrently herewith, in the case of *Farwell, O. K. & Co. v. Wallace*, ante, 173, 177 N. W. 103, and need not be repeated here. Suffice it to say that it evidences two complete changes of legislative policy, the first relating to situs and the second to the desirability of the tax provided for. The situs law, which was before this court in *State ex rel. Langer v. Packard*, supra, is completely changed so as apparently to make the determining factor either the domicile of the debtor, or the situs of the tangible property upon which the security is given, and this is again changed by the act of the special session of the legislature in 1919 which eliminates this criterion. As to the tax itself, the special session of the legislature repealed the law which provided for the tax on moneys and credits, saying, however, "any tax heretofore levied or assessed under or by virtue of any of the tax laws of this state." Laws of the Special Session of 1919, chap. 62, § 2. It does not affirmatively appear that any tax has heretofore been levied or assessed under any of the tax laws of this state as to the credits owned by the plaintiffs and which were obtained in the manner heretofore indicated. On the contrary, it rather appears that such taxes had not been assessed or levied up to the time of the institution of this suit, if not up to the time of the passage of the repealing law. In view of the grave doubt as to whether the legislature actually intended by the repealing act to save taxes that were in litigation prior to assessment, which litigation was known to be pending when the repealing act was passed, and of the further fact of the distinct change in policy evidenced by the repeal, our decision in his case will be of little or no value as a precedent and we have determined merely to state the conclusion at which we have arrived, with a brief statement of the reason therefor.

Our conclusion is that the plaintiffs are not liable for the taxes involved in this litigation. The statute (Sess. Laws 1919, chap. 229) which defines the jurisdiction of the state to tax the property involved herein, makes the revenue laws applicable to "all property and business . . . though the owners . . . may have or claim domicil elsewhere." And it is provided that if the holder of credit obligations secured by property within the state has no residence in the state "the taxes shall be deductible upon such obligations in the hands of the debtor or his agent." The money and credit tax sought to be levied under chapter 230 of the Session Laws of 1917, does not purport to be a tax upon any business conducted in this state nor does it evidence any attempt to tax capital employed in any business as such. On the contrary, it attempts to seize upon the single fact of the domicil of the debtor or the presence of the mortgaged property within the state as the sole test of jurisdiction to tax. It does not segregate the interests of the mortgagor and mortgagee in the property. The mortgagor must still pay a tax on the mortgaged property valued without regard to the mortgage. So, under the statutes referred to, the owner of a credit, secured by property within the state, is rendered liable to the tax even though he never had any business relations whatsoever with the debtor whose residence and property are here. The fiction of *mobilia sequuntur personam* is responsible for a broad assertion of the lack of jurisdiction to tax a credit in the state of a debtor's domicil. See *State Tax on Foreign-held Bonds*, 15 Wall. 300, 21 L. ed. 179. But while this fiction has been compelled to yield to facts pointing to the necessity of equal taxation of those engaged in business within a sovereign state, the principle has never been so completely reversed so as to authorize the state to seize upon the sole fact of the residence of the debtor and the presence of his mortgaged property within it as determining the taxing jurisdiction of the state. We are satisfied that this cannot be done where it would render negotiable instruments in the hands of non-resident owners subject to tax in this state.

As in the case of *Farwell, O. K. & Co. v. Wallace*, ante, 173, 177 N. W. 103, decided simultaneously with the case at bar, relief is asked from the capital stock tax sought to be levied under chapter 222, Session Laws of 1919. In our opinion, under the facts alleged, the plaintiffs are entitled to the relief sought. See *State ex rel. Langer v. Pack-*

ard, 40 N. D. 182, 168 N. W. 673; and Farwell, O. K. & Co. v. Wallace, *supra*.

Being of this opinion, it follows that the judgment appealed from must be reversed. It is so ordered.

For reasons stated in a per curiam opinion filed concurrently herewith in an original application to this court, it is also ordered that the two interveners are entitled to the benefits of the judgment to be entered in the district court.

CHRISTIANSON, Ch. J., and ROBINSON, J., concur.

BRONSON, J., concurs in result.

GRACE, J. (concurring in the result). This case had its inception in an application to this court for an original writ of injunction to restrain the defendants from the collection of certain taxes upon certain personal property, to which more particular reference will hereinafter be made.

The case is one in which this court could assume original jurisdiction upon the authority of *State ex rel. Linde v. Packard*, 32 N. D. 301, 155 N. W. 666; *State ex rel. Linde v. Taylor*, 33 N. D. 76, L.R.A. 1918B, 156, 156 N. W. 561, Ann. Cas. 1918A, 583; *State ex rel. Linde v. Hall*, 35 N. D. 34, 159 N. W. 281; *State ex rel. Linde v. Packard*, 35 N. D. 298, L.R.A. 1917B, 710, 160 N. W. 150; *State ex rel. Langer v. Packard*, 40 N. D. 182, 168 N. W. 673; *State ex rel. Lofthus v. Langer Bank*, 46 N. D. —, 177 N. W. 408.

The plaintiff, however, after an application to this court for such original writ, commenced an action in the district court of Burleigh county, before J. M. Hanley, Judge, acting as such on the written request of W. L. Nuessle.

The object of this action was to procure, from that court, an injunction permanently restraining the defendants from the collection of any of the tax, hereinafter referred to. A decision of this case will also dispose of the application for an original writ of injunction.

The defendants in the action, in addition to the tax commissioner, were Wm. Langer, attorney general of the state of North Dakota, and the county auditor of each and every county in the state.

The plaintiffs joined, in addition to the Capital Trust & Savings Bank, were Drake & Ballard Company; Gold-Stabeck Company; Minneapolis Trust Company; Grandin Investment Company; Hennepin Mortgage Company; Minnesota Loan & Trust Company; Merchants' Trust & Savings Bank; St. Paul Cattle Loan Company; The Farmers' & Mechanics' Savings Bank of Minneapolis; Hennepin County Savings Bank of Minneapolis, all of which are Minnesota corporations, except the St. Paul Cattle & Loan Company which is a West Virginia corporation. The latter company, being engaged in making chattel loans; its principal place of business is South St. Paul, Minnesota, and the former, real estate loans in the state of North Dakota, and the principal place of business of each is either at St. Paul or Minneapolis.

The plaintiffs made, served, and filed a complaint, setting forth the facts upon which they rely to obtain a permanent writ of injunction. To the complaint, the defendants demurred on the grounds that the complaint does not state facts sufficient to constitute a cause of action. This demurrer was, by an order of the district court, sustained, and a judgment of dismissal of the action entered. From that judgment, the plaintiffs have appealed to this court.

We will consider the matters involved in this case upon the matters presented in the district court, and the appeal from the decision and judgment of the district court. Our decision, upon the matters involved in this appeal, will dispose of the case.

The plaintiffs, with the exception of the St. Paul Cattle & Loan Company, are engaged in making real estate loans upon farm lands in the state of North Dakota. Some of them do an exceedingly large business in North Dakota, and there are none but what do considerable business. They are well known and long established loan companies.

That the plaintiffs had a large general business may be gathered from their complaint, and as most of these plaintiffs were before this state in the case of *State v. Packard*, supra, it may also be gathered from the facts in that case, and from the affidavit and papers filed therein. The plaintiffs, as we view the matter, have no desire to claim otherwise.

The statutes which it is necessary to examine in connection with this case, part of which, at least, must be interpreted, are as follows: Chap. 229, Session Laws of 1917, which was an amendment of § 2095, Comp. Laws 1913. It reads thus:

"Except as otherwise provided in this chapter, personal property shall be listed and assessed in the county, town, or district where the owner or agent resides; the capital stock and franchises of corporations and persons shall be listed in the county, town, or district where the principal office or place of business of such corporation or person is located in this state; and if there be no principal office or place of business in this state where such corporation or person transacts business, then personal property pertaining to the business of a merchant or manufacturer or corporation shall be listed in the town or district where his business is carried on.

"The taxation and revenue laws of this state shall apply with equal force to any person or persons representing in this state business interest that may claim domicile elsewhere, the intent and purpose being that no nonresident, either by himself or through any agent, shall transact business within the state without paying to the state a corresponding tax with that exacted of its own citizens; and all bills receivable, obligations, or credits arising from business done in this state are hereby declared assessable within this state, and at the business domicile of said nonresident, his agent, or representative; provided, however, no insurance company paying the state a percentage of its gross premiums received in the state shall be subject to the provisions of this act."

Section 1 of chapter 230, Session Laws of 1917, reads thus: "Money' and 'credits,' as the same are defined in § 2074, Comp. Laws 1913, including bonds and stocks, are hereby exempted from taxation other than that imposed by this act, and shall hereafter be subject to an annual tax of three mills on each dollar of the fair cash value thereof. But nothing in this act shall apply to money or credits belonging to incorporated banks or building and loan associations situated in this state, nor to any indebtedness on which the tax is paid under a mortgage registration act, or is exempted by statute."

Section 2074, Comp. Laws 1913, defines the term "credits" as follows: "The term 'credits' means and includes every claim and demand for money or other valuable things, and every annuity or sum of money receivable at stated periods, due or to become due, and to all claims and demands secured by deeds, or mortgages due or to become due."

In 1919 the legislature of this state enacted a statute known as Sen-

ate Bill No. 40, which is chapter 229, Session Laws of 1919, which amended and re-enacted § 2095, Comp. Laws of North Dakota, for the year of 1913, as amended by chapter 229, Session Laws of North Dakota of 1917, relative to revenue, taxation and fixing the situs of personal property for tax purposes. As thus amended, it reads thus: "Except as otherwise provided in this chapter, personal property shall be listed and assessed in the county, town or district where the owner or his agent resides; the capital stock, bond issues and franchises of corporations and all mortgages, notes, bills payable and other intangible property of a person or corporation shall be listed in the county, town or district where the principal office or place of business of such corporation or person is located in this state; and if there be no principal office, or place of business in this state, where such corporation or person transacts business, then personal property pertaining to the business of such person or corporation shall be listed in the town or district where the business is carried on or where the property upon which debts payable to him or it exists. The taxation and revenue laws of this state shall apply with equal force to all property and business and all increase or profit therefrom, though the owners or recipients of the same may have or claim domicil elsewhere, the intent and purpose of this act being that all property or interest in property within the state, or income or profit derived therefrom, shall be subject to all the taxes imposed by the laws of the state whether the owner of such property or the person receiving such income or profit reside within the state or elsewhere; and all bills receivable, obligations or credits secured by or upon any property existing within the state, including the shares of stock and bonds of corporations organized or doing business in the state or owning property therein, shall be taxable at the residence of the holders of such obligations within the state, if such residence there be, or otherwise the tax shall be deductible upon such obligations in the hands of the debtor or his agent, or the agent of the creditor within the state; and in every case where the tax is due and unpaid, it shall constitute a first lien upon the property upon which such obligation is secured, and a part of such obligation, which shall be satisfied in any action for the enforcement of such obligation, and the amount of the tax withheld and paid to the state, and deducted from the amount awarded to the judgment creditor in such action; provided, that no in-

insurance company paying the state a percentage of its gross premiums received in the state shall be subject to the provisions of this act."

Under chapter 226, Session Laws 1919, it was made the duty of the attorney general, upon complaint of the tax commissioner, when he had reason to believe that certain personal property, known as money and credits, had not been listed for assessment as provided by chapter 230, *supra*, to cause an investigation to be made, and upon notice and hearing to value and assess any such property which had not been listed, and to certify the assessment to the county auditor of the county wherein the corporation or company, association or person owning such property has situs, for the purpose of taxation. Under such laws, the attorney general has authority and power to subpoena the corporation, company, association or person to appear before him with books, papers and records, and under oath, submit to examination as to the assessment of said personal property. It is not necessary to refer to the other sections in this chapter. They relate principally to the duty of the county auditor, the effect of serving a subpoena as above provided for, and to witness fees and mileage, etc.

The legislature of 1919 also enacted chapter 222, Session Laws 1919, providing for a tax on shares of stock or corporations, joint-stock, companies or associations, then and thereafter, organized in the state, for profit, and having capital stock represented by shares or by issuing bonds, and provided for the collection annually thereon of a special excise tax, with respect to the carrying on or doing business in the state by such corporation, of 50 cents for each \$1,000 of the fair value of the capital stock or bonds issued. And provided further that in estimating the value of the capital stock, the surplus and undivided profits of such corporation, joint-stock company or association shall be included, and provided further that the amount of such annual tax shall, in all cases, be computed on the basis of the fair average value of the capital stock and bonds for the preceding year, and further provided that, for the purpose of the tax, an exemption of \$10,000 shall be allowed from the capital stock of such corporation, joint-stock company or association. That law further provides that every corporation, joint-stock company or association, now or hereinafter, organized under the law of any other state, and United States, or a foreign country, and engaged in business in the state during the previous calendar year, shall pay annually a special excise

tax, with respect to the carrying on or doing business in the state by such corporation, joint-stock company or association, the equivalent to 50 cents for each \$1,000 of the capital actually invested in the transaction of business in the state, and provided further that, in the case of a corporation engaged in business partly within and partly without the state, investment within the state shall be held to mean that proportion of its entire stock and bond issues which its business within the state bears to its total business within and without the state, and where such business within the state is not otherwise more easily and certainly separable from such entire business within and without the state; business within the state shall be held to mean, such proportion of the entire business within and without the state as the property of such corporation within the state bears to its entire property employed in such business, both within and without the state.

The amount of such annual tax is to be computed on the basis of the average amount of capital so invested during the preceding calendar year, and further provides that, for the purpose of the tax, an exemption of \$10,000 from the amount of capital invested in the state shall be allowed only if such corporation, joint-stock company or association furnished to the tax commissioner all the information necessary to its computation.

There are other provisions relating to railroad, telephone, telegraph, and express companies, and others that need not be noticed in this decision, and there are certain other organizations exempted from its provisions.

The method by which the plaintiffs claim their real estate loan business in North Dakota is transacted, is illustrated by that followed by the Capital Trust & Savings Bank, which is claimed to be substantially as follows: Persons or corporations living in the state of North Dakota, and engaged in the banking, loan or real estate business there, having applications for loans made to them by owners of farms and other lands in the state of North Dakota, submit such applications to the Capital Trust & Savings Bank.

The applications for such loans are in writing and are sent by mail to the office of the Capital Trust & Savings Bank at St. Paul, Minnesota, for its consideration. In some cases, the plaintiff accepts the applications and in others, the applications are rejected. If it is decid-

ed to make the loan applied for, the notes and mortgages are executed by the borrower, who is generally a resident of the state of North Dakota.

The loan broker in North Dakota, through whom such application is made, attends to the execution and recording of all papers, and when the notes, mortgages and other papers are complete, they are sent by mail to the plaintiff in St. Paul, Minnesota, for its examination and approval. It also examines the papers at the city of St. Paul, Minnesota. The abstracts of title are examined there, and if the papers are approved, the money loaned is transmitted by the plaintiff in St. Paul, to the loan broker by whom application is received, either by drafts or by cashier checks drawn on funds in the state of Minnesota; or, in some instances, the funds are deposited in banks in the state of Minnesota to the credit of the loan broker through whom the application is received.

The plaintiff claims to have no agent acting for it in such matters in the state of North Dakota, and that the business is transacted through loan brokers of North Dakota, who have no authority to act for the plaintiff nor accept loans for it, nor bind it in any way. They claim further, that loan brokers in North Dakota, through whom such applications are made, receive their commissions for compensation from the borrower, and as the borrower's representative.

The mortgage and notes are usually signed within the state of North Dakota. When the loan is made, the notes, mortgages and other papers in connection with it are kept by the plaintiff at its office in the city of St. Paul, so long as it owns the same.

The plaintiff does not, and has not, heretofore, kept any funds within the state of North Dakota for investment. The notes secured by such mortgages are made payable at the office of the plaintiff in the city of St. Paul. In some instances, the plaintiff purchased notes and mortgages from banks or persons engaged in the mortgage and loan business in the state of North Dakota, which have previously acquired the same, and in all such cases the papers relating to such mortgage loans are sent to the plaintiff at its office in St. Paul, for examination and approval, and if the plaintiff determines to purchase such loan, the purchase price is transmitted from the city of St. Paul by draft or

cashier's check otherwise in the same manner as where the loan is made by the plaintiff in the first instance.

The St. Paul Cattle & Loan Company, which conducts its business of making or purchasing loans, secured by chattel mortgage, proceeds in the same manner as the Capital Trust & Savings Bank, the only difference being that the notes, held and owned by it, are secured by chattel mortgages on live stock or personal property in North Dakota.

It is claimed that all the notes and mortgages now held, or held on April 1, 1919, by any of the plaintiffs, were acquired in the manner above set forth, and that none of said notes or mortgages arose out of any business transacted in the state of North Dakota, unless the making or purchasing of mortgage loans, in the manner above set forth, constitutes doing business in the said state.

It is further claimed that none of the plaintiffs kept any capital or funds in the state of North Dakota for investment or had or maintained any agents or place of business in said state, and that all of the loans are kept and retained by the respective plaintiffs at their places of business, aforesaid, outside of the state of North Dakota, from the time the loans are acquired until the same are paid or sold.

It is further claimed that each of the promissory notes and writings, signed by the maker, contains an unconditional promise to pay a sum certain, in money, at a definite future time, and that the same are payable to order or bearer, and are negotiable in form and in fact.

The complaint properly avers all of the foregoing as facts, and, in addition thereto, avers there is no statute in force in the state of North Dakota providing for the taxation of mortgages as an interest in real estate, or providing for the taxation of real estate by dividing the real estate tax between the mortgagors and the mortgagees in proportion to their respective interest, and that the rate of taxation in the state of North Dakota, at all times, has been and is largely in excess of three mills on dollar for real estate and personal property other than money and credits.

A demurrer having been entered to the complaint and sustained, judgment was entered for the dismissal of the action.

The errors assigned are, that the court erred in making its order, sustaining the demurrer, and in ordering and rendering judgment in

favor of the defendant against the plaintiff for a dismissal of the action, and for costs.

The principal question presented in this case has reference to the situs of the intangible personal property in question, for the purposes of taxation, and further, whether a tax levied in pursuance of the law under consideration, is a violation of any of the provisions of either the state or Federal Constitution. A disposition of these questions will dispose of the entire case.

The plaintiffs invoke the ancient legal fiction of "*mobilia sequuntur personam*." Perhaps there has been no fiction of law under cover of which the owners of intangible property, such as we have under consideration, that has been more generally used to avoid payment and discharge of duties and obligations to the sovereign power, than the one we have under consideration. In other words, none which permitted such great facility in avoiding the taxation of this class and character of property. It has been by the invocation of this rule that persons without limit, who possessed this kind of property, have successfully avoided being taxed thereon, and thereby avoid discharging their just liabilities and duties to the government and the public.

Under this fiction, untold millions of dollars of the most valuable of property, this intangible property, wholly escapes taxation. The result is, too often, that those best able to pay taxes, by reason of being large owners of this class of property, almost wholly escape the burdens and duties imposed by taxation. Shrewdly, they keep invested their wealth in such intangible property and possess only a minor part of their wealth in tangible property, which, of course, cannot well escape taxation; thus, the burdens of taxation may be imposed largely upon those least able to bear it, and upon those who are the owners of tangible property.

A "fiction of law" is an assumption or supposition of law that something which is or may be false, is true, or that a state of facts exists which has never really taken place. 2 Words & Phrases, 2d Series, p. 526. See also the cases there cited of *Leavell v. Blades*, 237 Mo. 695, 141 S. W. 893. "When logic and the policy of the state conflict with the fiction, due to historical tradition, the fiction must give way." *Blackstone v. Miller*, 188 U. S. 189, 47 L. ed. 439, 23 Sup. Ct. Rep. 277.

A fiction of law is the imagination of something to be true which,

in fact, is, or may be, false, and which imagines a condition to exist which, in fact, does not exist. The fiction, above mentioned, is one which perhaps falls within any of the definitions above given, and it is really the basis upon which the claims of plaintiffs herein really rest. It is the corner stone of their argument which, if removed, would result in their case falling, of its own weight, for want of support.

The notes and mortgages in question are choses in action, and are intangible property, and having been executed and delivered in the manner above set forth, and having been delivered into the possession of the plaintiffs, and now held by them, the question arises: What is the character of the property sought to be taxed, and where is the proper situs in such case for the exercise of the power of taxation?

It is elementary that the power of the state to levy a tax upon property extends only to property within the state, and the jurisdiction of the state to tax ceases at the lines bounding the state, for there the jurisdiction of another state to tax commences.

It has been held that the state where the owner maintains his domicile may levy taxes upon shares of stock owned by him in a foreign corporation, holding all of its property, and doing all of its business in another state. *Hawley v. Malden*, 232 U. S. 1, 58 L. ed. 477, 34 Sup. Ct. Rep. 201, Ann. Cas. 1916C, 842. It has also been held where one has deposited in a banking institution of another state than his domicile, where he carries on a business from which deposits are derived, and which belongs to the depositor, but not used by him in the business, that such deposits are subject to taxation at his domicile though they are also subject to taxation in the state where the business is carried on. *Fidelity & C. Trust Co. v. Louisville*, 245 U. S. 54, 62 L. ed. 145, L.R.A.1918C, 124, 38 Sup. Ct. Rep. 40.

In the cases just cited, the taxation was not upon the theory that the state had a right to tax property beyond the state limits, but in accord with the theory that the property was within the jurisdiction of the taxing power.

The law which we are considering proposes to fix the situs of the character of property under consideration, for the purposes of taxation, at the residence of the debtor.

It is the public policy of this state, acting through legislative authority by enactment of the statutes we are considering, to abolish the fic-

tion of *mobilia sequuntur personam*, in so far as it is applicable to this character of property. As applied to this class of property after the enactment of the statutes in question, that fiction has no application. It no longer exists as a fiction of law in this regard. The authority, above cited, is sufficient to demonstrate that the fiction must give way to the logic and policy of the state which conflicts with it. This state has the power to render the fiction impotent, and fix the situs of this intangible property within this state. It has the right to assume actual control of and localize it for the purposes of taxation; this, in the exercise of its sovereign powers, and upon the theory and principle that the mortgages and notes in question are not, in truth and in fact, the actual property sought to be taxed, but are but an evidence of it.

We may illustrate as follows: Supposing A has \$1,000,000 in a bank in New York city. That, is property. He concludes to loan all of it upon farm lands in the state of North Dakota, and does loan it in the same manner as the plaintiffs herein; by this transaction, he has transferred his property, the \$1,000,000, to the various borrowers in the state of North Dakota, who have received said property. They are A's debtors; they have, in their possession, A's property, the money, which he loaned them. Each of them gave A something to show they had, in their possession, his property. Each of them gave him a promissory note which showed how much property or money they had received from him, and which showed at what time they were to return it to him, and how much they were to pay him for the use of it while they had it in their possession. The note was secured by a real estate mortgage upon land, in order to insure that the property would so be returned to A. In other words, the notes and mortgages, in the hands of A, are but evidence of the fact that he has placed his property, the money in question, in the hands of those to whom he loaned it. The actual property is now in the hands of the debtors. While it is in their hands, it is not down in New York city, nor elsewhere; it is with the debtors.

If A, after he received the notes and mortgages, the evidences of where his property was located, had placed them in a safe in New York city, and the safe should burn and all the notes and mortgages were destroyed; and supposing further that at the same time all the records in the counties in North Dakota where A had loaned his money were

destroyed by fire or otherwise, this would not destroy A's property, but would only, to some extent, destroy the evidence as to what persons in the state of North Dakota had some of A's property.

In either case, the debtors still have A's property, and, by showing that the evidence of the location of this property has been destroyed, he may supply that evidence by oral testimony, by testimony from his debtors and by his own testimony and records, and, when he has made proper proof, may recover every dollar of property which he has permitted the debtors to have, and enforce his obligations and mortgages against their land to the same effect as if he still had the mortgages and notes. Each of them would be compelled, upon proper proof, to return to A every dollar of the property which they received from him, and this, notwithstanding all notes and mortgages were destroyed and every record showing such mortgages was destroyed. The thing of value, therefore, is not the notes and mortgages. They are but evidences of the obligation of that property which the debtor has received, and his obligation to repay it.

These are the primary things and they will remain after all evidence of the indebtedness or the credit is destroyed. It must not be forgotten that it is the sovereignty of the domicile of the debtor which gives validity to the obligation; that protects and cares for the property which A loaned to his debtors; that the remedies, which the sovereign power of the debtor's domicile has provided for A to enforce the obligations against his debtor, to recover from his property placed with him, are also a part of the very contract between A and his debtors.

The writer of this opinion used substantially the following language in his dissenting opinion, in the case of *State ex rel. Langer v. Packard*, *supra*; we think it applicable to case now before us. "There can be no question but what the state has jurisdiction to impose a tax, under consideration, upon the intangible property [involved] in this proceeding. The intangible property is located within this state. That is the obligation, the thing of value, is within this state. The debtor resides within this state. The power to enforce the obligations, under consideration, is within this state. . . . Though the evidence of such obligation may be without the state, the obligation, the thing of value, the credit, being within this state, the state has jurisdiction to apply [its] taxing laws to such obligation and credits in the same manner as it

applies the taxing laws to similar obligations and credits of its own citizens." See *State ex rel. Langer v. Packard*, 40 N. D. 182, 168 N. W. 683.

We are satisfied the true situs for taxation purposes of the intangible property, which is the subject of this litigation, is in the state of North Dakota at the domicile of the respective debtors; that the state had the authority and power to, and by the statutes under consideration did, fix the situs of this property for the purposes of taxation at the domicile of the debtor.

The law is a salutary one. It imposes no burden upon the nonresident owner of this property that is not equally borne by a citizen of this state possessing like property. It is also further to be noted that, it is a law which, in its operation, will, in all probability, cause this large class of property, which in amount and value in this country probably equals or exceeds all tangible property, both real and personal, and which has largely, heretofore, escaped taxation on account of the inability of taxing officers to locate it, to be hereafter assessed and caused to bear its just proportion of the expense of maintaining the sovereignty, the laws of which protect such property equally with all other kinds of property.

No taxing officer may or can know of the credits one possesses, especially if those credits and obligations are those of other states or foreign countries, than that where the one whose property is sought to be assessed resides, or unless such a one voluntarily discloses the possession of such credits. The taxing officer may readily know, from the debtor, what obligations or debts he owes. Especially would the debtor be anxious to give such information when he is given to understand that the object of procuring it is to tax the obligation against the person to whom it is payable, whether he be a resident or nonresident, for the purpose of compelling such one to pay, to the sovereign power, his just contribution to the public needs, and in support of such sovereign power in return for the benefits of the protecting laws of that sovereign power, which are thrown about such obligation and the conduct of the business.

In the case of *State ex rel. Langer v. Packard*, supra, this court, with the exception of the writer hereof, held that the three-mill tax sought to be levied upon the intangible property involved in that case, which

is similar to that involved in this case, could not be levied, for the reason that it was not shown that the plaintiffs in that case were transacting business within the state of North Dakota, or that the business, out of which the credits arose, was transacted within the state, and that doing business within the state meant more than a single transaction or a series of isolated transactions, and that the nonresident who had established no place or had no agent or representative within the state, or did not keep his capital or funds for investment in the state, but made loans on applications sent to him by loan brokers in the same manner and upon the same general plan as is involved in the present case, were not doing business within the state, within the meaning of chapter 229, Sess. Laws 1917.

The Legislative Session of 1919 promptly met this objection by the passage of Senate Bill No. 40, which is chapter 229 of the Laws of 1919, which amended § 2095, Comp. Laws 1913, as amended by chapter 229, Session Laws of 1917, by leaving out the objectionable words and phrases above referred to. The amendment is shown in the Senate Bill No. 40 as above set forth.

It will be seen from the examination of Senate Bill No. 40, that it makes applicable the taxation and revenue laws of the state to all property and business, and all increase and profit therefrom within the state, though the owners or recipients of the same may have or claim domicile elsewhere. That law also declares the legislative intent and purpose of the act to be, that all property or interest in property within the state, or income or profit derived therefrom, is subject to taxation by the laws of this state, regardless of the fact of whether the owner of such property, or person receiving such income or profit resides within the state or elsewhere, and provides further that such tax shall be deductible from the obligations in the hands of the debtor or his agent, or the agent of the creditor within the state, and provides further that it shall be a first lien upon the property upon which the obligation is secured, etc. Thus, it is clearly the intent of the act under consideration to tax all intangible property of the nature of that involved in this action, and the situs of it for the purpose of taxation is the residence or domicile of the debtor; that it is the further purpose of the act to tax all such obligations whether they are isolated transactions or form one of many.

It is clear the legislature has, by this act, localized, for the purpose of taxation, everything of value, including intangible property such as is the subject of this action, arising out of business transactions within the state, whether isolated transaction or not, at the domicile of the debtor within the state.

It may be well, at this point, to examine some of the decisions cited by the plaintiffs in support of their contentions, which assert the invalidity of the statutes in question, and those of the respondent's which, it is claimed, establish the validity of the statutes. Such decisions may be considered at the same time, as an analysis of the authority cited by plaintiffs will necessitate a reference to the authority cited by the respondents. We cannot refer to many of the decisions as it would make this opinion of undue length.

The leading case upon which plaintiffs largely rely to sustain their contention is *State Tax on Foreign-held Bonds*, 15 Wall. 300, 21 L. ed. 179. It may be said of that case, that it fully recognizes the fiction of law, "*mobilia sequuntur personam*," and it held that the bonds, under consideration in that case, were property only in the hands of the holders, and when held by a nonresident were beyond the jurisdiction of the state to tax.

It is claimed by plaintiffs that that decision of the Supreme Court of the United States has never been overruled. In a sense, that court has never, in expressed terms or words, overruled that decision, and as we understand the procedure in that court in this respect, it never does overrule a former decision by express language. In practice, however, it does, in effect, overrule its decisions by changing the rule in a given case to what it was in a former decision under a somewhat similar state of facts. For instance, in decisions subsequent to that rendered in the case of *State Tax on Foreign-held Bonds*, *supra*, the rules and principles of law, applied in that case, were largely supplanted and superseded by other and, as we believe, more equitable and just rules.

The rule stated by the United States Supreme Court in the case of *State Tax on Foreign-held Bonds* was, in principle, to all intents and purposes, practically overruled in the case of *New Orleans v. Stempel*, 175 U. S. 309, 44 L. ed. 174, 20 Sup. Ct. Rep. 110. At that time Louisiana had in force and effect a *Situs Act* passed by its legislature in 1898, and § 7 of it related to the taxation of stocks of mercantile

firms whether such firms were domiciled in the state of Louisiana or elsewhere. The express intent and purpose of the act being that no nonresident, either by himself or through an agent, should transact business within the state of Louisiana without paying to the state a corresponding tax with that exacted of its own citizens, etc.

It further provided that all bills receivable, obligations or credits arising from the business done in the state, were assessable within the state at the business domicile of the nonresident, his agent, or representative.

In the case of *Liverpool & L. & G. Ins. Co. v. Board of Assessors*, 221 U. S. 346, 54 L. ed. 762, L.R.A.1915C, 903, 31 Sup. Ct. Rep. 550, the Louisiana Act of 1898 was again construed. Part of the language used in that case is quite applicable to this, as bearing upon the right of the legislature to fix the situs of the class of property we are considering for the purpose of taxation. In that case, the court used the following language:

"The asserted distinction cannot be maintained. When it is said that intangible property, such as credits on open account, have their situs at the creditor's domicile, the metaphor does not aid. Being incorporeal, they can have no actual situs. But they constitute property; as such they must be regarded as taxable, and the question is one of jurisdiction.

"The legal fiction expressed in the maxim, 'mobilia sequuntur personam,' yields to the fact of actual control elsewhere. And in the case of credits, though intangible, arising as did those in the present instance, the control adequate to confer jurisdiction may be found in the sovereignty of the debtor's domicile. The debt, of course, is not property in the hands of the debtor; but it is an obligation of the debtor, and is of value to the creditor, because he may be compelled to pay; and power over the debtor at his domicile is a control of the ordinary means of enforcement. Blackstone v. Miller, 188 U. S. 205, 206, 47 L. ed. 444, 445, 23 Sup. Ct. Rep. 277. Tested by the criteria afforded by the authorities we have cited, Louisiana must be deemed to have had jurisdiction to impose the tax. The credits would have had no existence save for the permission of Louisiana; they issued from the business transacted under her sanction within her borders; the sums were payable by persons domiciled within the state, and there the rights of

the creditor were to be enforced. If locality, in the sense of subjection to sovereign power could be attributed to these credits, they could be localized there, if as property they could be deemed to be taxable at all, they could be taxed there."

The court further said in that case referring to the question of situs: "But, as we have seen, the jurisdiction of the state of his domicile over the creditor's person, does not exclude the power of another state in which he transacts his business to lay a tax upon the credits there accruing to him against resident debtors, and thus to enforce contribution for the support of the government under whose protection his affairs are conducted. And that the jurisdiction of the latter state rests upon considerations which are more fundamental than that notes have been given or that the credits are evidenced in any particular manner, was clearly brought out in the concluding statement of the opinion in the case of Metropolitan L. Ins. Co. v. New Orleans, 205 U. S. 402, 51 L. ed. 856, 27 Sup. Ct. Rep. 499. There the court said: 'Moreover, neither the fiction that personal property follows the domicile of its owner, nor the doctrine that credits evidenced by bonds or notes may have the situs of the latter, can be allowed to obscure the truth.' Blackstone v. Miller, 188 U. S. 189, 47 L. ed. 439, 23 Sup. Ct. Rep. 277."

To the same effect is the case of Metropolitan L. Ins. Co. v. New Orleans, 205 U. S. 395, 51 L. ed. 853, 27 Sup. Ct. Rep. 499. This was a case in which the board of assessors of New Orleans attempted to assess credits of the plaintiff insurance company, domiciled in New York. It made loans upon its policies to citizens of New Orleans or other citizens of Louisiana, and the method of transacting such business was practically identical with the method employed by the plaintiffs in the case at bar. The Supreme Court of the United States in that case said: "The evident purpose of this law is to lay the burden of taxation equally upon those who do business within the state. It requires that in the valuation for the purposes of taxation of the property of mercantile firms, the stock, goods and credits shall be taken into account to the end that the average capital employed in the business shall be taxed. This method of assessment is applied impartially to the citizens of the state, and to the citizens of other states or countries doing business, personally or through agents, within the state of Louisiana."

To the same effect, *Savings & L. Soc. v. Multnomah County*, 169 U. S. 421, 42 L. ed. 803, 18 Sup. Ct. Rep. 392. The last case, as well as the foregoing cases cited, sustains the conclusions at which we have arrived in this case. It does appear, however, that the statute of Oregon, under consideration in that case, considered the mortgage as an estate in the land mortgaged, and partly, at least, upon this theory, held that the mortgage was taxable as an interest in land.

Under the statutes of North Dakota a mortgage on land does not transfer an interest therein. Section 6725, Comp. Laws 1913, defines a mortgage thus: "Mortgage is a contract by which specific property is hypothecated for the performance of an act without the necessity of a change of possession." Section 6726, Comp. Laws. "The lien of the mortgage is special unless otherwise expressly agreed and is independent of possession." Section 6727. "Every transfer of an interest in property, other than in trust, made only as security for the performance of another act, is to be deemed a mortgage, except when in the case of personal property, it is accompanied by an actual change of possession in which case it is deemed a pledge." Section 6740: "A mortgage does not entitle the mortgagee to the possession of the property unless authorized by the expressed terms of the mortgage."

It is clear, under the laws of this state, that a mortgage upon land does not transfer to the mortgagee an estate in the land but merely gives a lien thereon as security for the debt. There is no transfer of title nor of possession. The mortgage and the note in his hands are personal property, are choses in action, and, under the statute we are considering, are taxable as such at the domicile of the debtor. There can be no doubt that it is competent for the legislature to determine that a real estate mortgage shall, for the purposes of taxation, be considered and determined to be personal property.

From the laws of this state above cited, and the acts under consideration, real estate mortgages, for the purposes of taxation, are determined to be personal property. There is no room for the plaintiffs to say that the tax sought to be levied is invalid by reason of it being double taxation. It is nothing of the kind. The tax sought to be collected from the plaintiffs is not a tax against the land, but a tax against certain personal property, to wit: mortgages and notes by them held, which are, by the laws of this state, for the purposes of taxation, deter-

mined to be personal property, and the situs for such taxation fixed at the domicile of the debtor.

The plaintiffs were in no position to raise the question of double taxation, if there be such a question in the case, which we think there is not. The tax sought to be levied is not one against land nor any estate in land, but a tax purely upon personal property.

The state, as we view the matter, in view of the statutes under consideration, had jurisdiction to tax the notes and mortgages, the situs of which, for the purpose of taxation, was, by the statutes, fixed at the domicile of the debtor.

There is no contravention of the 14th Amendment of the Federal Constitution, nor any violation of the contract clause thereof, by requiring the debtor to pay the tax in question, and deduct it from the debt. There can be no violation of any constitutional provision, either state or Federal, if the state has jurisdiction to levy the taxes in question. The statute in question, having declared the intangible property under consideration to be personal property, and having fixed its situs, for the purpose of taxation, at the domicile of the debtor, and the state having the authority and power to change the rule of *mobilia sequuntur personam*, and having done so, its jurisdiction to levy the tax would seem certain.

It was said in the case of *Bristol v. Washington County*, 177 U. S. 133, 44 L. ed. 701, 20 Sup. Ct. Rep. 585: "Persons are not permitted to avail themselves for their own benefit of the law of the state in the conduct of business within its limits, and then to escape their due contribution to the public needs through action of this sort, whether taken for convenience or by design."

After the submission of this case, the laws to which we have referred, with the exception of chapter 222 of the Session Laws of 1919, at a special session of the legislature of 1919, were repealed, by the enactment of chap. 62 of the laws of that special session, and therein, money and credits, as the same are defined in § 2074, Comp. Laws 1913, are exempted from taxation, with the exception that the income therefrom, except as to income derived from loans on North Dakota real property, shall be taxable under the provisions of chap. 224 of the Laws of North Dakota, for the year 1919, except as therein exempted.

Chapter 255 of the Laws of North Dakota, for the year of 1915,

chap. 230 of the Laws of North Dakota, for the year of 1917, as amended by chap. 226 of the Laws of North Dakota, for the year of 1919, were specifically repealed.

Defendants' entire case having been based and rested upon the laws which are repealed, as above stated, there remains nothing to support the judgment entered in defendants' favor. There is a provision in chap. 62 of the laws of the special session which provides that taxes theretofore levied under any of the tax laws of this state shall not be invalidated or discharged. There is no showing, however, that any taxes were levied under the laws which have been repealed, and there is nothing in that regard to support the judgment rendered in this case.

In these conditions, it will be necessary to reverse the judgment appealed from.

As we understand the matter, chapter 222 of the Session Laws of 1919, in a case in the United States circuit court of appeals, has been decided to be in conflict with the Federal Constitution.

An appeal has been taken from that decision, and is now pending, and about to be heard before the Supreme Court of the United States. If the judgment of the Circuit Court of Appeals is affirmed, it will follow that the law will be declared invalid, and will thereafter be of no force nor effect.

The laws in question having been repealed, with the exception of chap. 222 of the Session Laws of 1919, I concur in the result arrived at by the opinion of the court.

ROBINSON, J. This is a double-header on a statute which has been repealed. In the first case the plaintiffs are nonresident jobbers. The money loaners hold mortgages, secured on lands, in every county of the state, and the jobbers likewise hold securities and credits for goods sold. The defendants claim that such securities are subject to taxation. This, the plaintiffs deny. To test the matter each party brings an original proceeding in this court to enjoin the tax assessment and levy. Then, for the same purpose, each party brings an action in the district court of Burleigh county. A demurrer to the complaint is sustained and each party appeals. The question presented is: Are the notes and securities subject to assessment and a tax of three mills on the dol-

lar?

The question is on the validity or proper construction of the recent money and credits statutes: chap. 229, Laws 1917; chap. 230, Laws 1917; H. B. 83 of March 5, 1919; S. B. 40, March 6, 1919; H. B. 47, March 7, 1917.

As it seems, these statutes are framed with an idea that it is competent for the state to levy its taxes on adjacent states; to levy taxes without stating the object of the same; to levy taxes for the municipalities, instead of leaving them to levy their own taxes; to levy a percentage tax without limit on any class of property and to assess all property by the tax commissioner and the attorney general at their office in the Capitol.

All that is contrary to the plain words of the Constitution:—

"Section 174. The Legislative Assembly shall provide for raising revenue sufficient to defray the expense of the state for each year, not to exceed in any one year four mills on the dollar of the assessed valuation of all taxable property in the state, to be ascertained by the last assessment made for state and county purposes, and also a sufficient sum to pay interest on the state debt.

"Section 175. No tax shall be levied except in pursuance of law, and every law imposing a tax shall state distinctly the object of the same, to which only it shall be applied.

"Section 176. Laws shall be passed, taxing by uniform rule, all property according to its true value in money.

"Section 179. All property, except as hereinafter in this section provided, shall be assessed in the county, city, township, town, village, and district in which it is situated in the manner prescribed by law." (The exceptions relate to the property of the common carriers, which is to be assessed by the State Board of Equalization.)

Under Article 29, the recent amendment to § 176, taxes shall be uniform upon the same class of property, including franchises within the territorial limits of the authority levying the tax. This does authorize the legislature to classify property, as it has done, but it gives no authority to vary the constitutional manner of making the assessment and levying the taxes. The conclusions are these:

(1) Every law imposing a tax must state distinctly the object of the same, and the law imposing the three-mill tax does not in any man-

ner state the objects of the same. It merely apportions the tax between the state and the municipalities.

(2) The state tax levies are limited to four mills on the dollar of the assessed valuation of all the property in the state. Hence such levies must be based on the assessed valuation and they may not exceed the limit.

(3) The municipal corporations are self-governing constitutional entities. They must control their own local affairs and levy their own taxes. Hence it is not competent for the legislature to levy a tax of three mills to be thrown into the laps of the municipalities. Const. §§ 130-183; *Ex parte Corliss*, 16 N. D. 470, 114 N. W. 962.

(4) With a few exceptions relating to common carriers, all property must be assessed in the county, city, township, village or district in which it is situated. It must be done in the manner prescribed by law and it must be done by the assessor of the taxing district, and not by any one outside of the district. And the party assessed must have his day in court; he must have the right to be heard and a right of appeal to the boards of equalization and the courts.

(5) The state has no jurisdiction to tax any nonresident who has in the state no business agency, no property, money or credits with a local or business situs or domicile.

(6) As mortgagors bear all the burdens imposed upon their security, the three-mill statute imposes on them double taxation and it impairs the obligation of their contracts and lessens the means of enforcing them. Validity and remedy are both parts of the obligation of a contract and are protected by the Federal Constitution against impairment.

Reversed and action dismissed.

STATE OF NORTH DAKOTA, EX REL. CAPITAL TRUST & SAVINGS BANK, a Corporation, et al., Relators, Plaintiffs, v. GEORGE E. WALLACE, as Tax Commissioner of the State of North Dakota, et al., Defendants and Respondents, and FARMERS & MECHANICS SAVINGS BANK of Minneapolis, and Hennepin County Savings Bank, Intervening Relators.

(177 N. W. 451.)

Controlled case.

This case is controlled by the case of Capital Trust & Sav. Bank v. Wallace, No. 3810 on the calendar of this court, ante, 182, 177 N. W. 440.

Opinion filed March 13, 1920.

Original proceeding.

Writ denied.

Butler, Mitchell & Doherty, and *Miller, Zuger & Tillotson*, for relators.

Miller, Zuger & Tillotson, Roberts & Strong and *Benjamin P. Myers*, for intervening relators.

William Langer, Attorney General, and *F. E. Packard*, Assistant Attorney General, for respondents.

PER CURIAM: This is an original application asking at the hands of this court the same relief sought in an action of the same title (except as to interveners) which was begun in district court, and which is disposed of on appeal under the same title (with the exception noted), being Number 3810 upon the calendar of this court, ante, 182, 177 N. W. 440. In this original proceeding The Farmers & Mechanics Savings Bank of Minneapolis, and the Hennepin County Savings Bank filed a petition in intervention which was, upon stipulation, allowed. The rights of the interveners are therefore determined to the same extent as those of the original parties. The opinion in the appeal case (No. 3810) is decisive of the issues presented upon this petition as to all parties hereto. Though, for the reasons stated in the opinion referred to, the plaintiffs are entitled to the relief sought, it will not be granted in this original proceeding, as full relief can be obtained in the proceed-

45 N. D.—14.

ing brought in district court. The interveners are hereby declared entitled to the benefit of the judgment to be entered in the district court.

BRONSON, J. I concur in the result.

GRACE, J. (concurring in result). The laws mentioned in the case of Capital Trust & Sav. Bank v. Wallace, ante, 182, 177 N. W. 440, having been repealed, with the exception of chap. 222 of the laws of 1919 and by reason of this, and the reasons stated in my opinion, in the case of Capital Trust & Sav. Bank v. Wallace, I concur in the result only.

HONSTAIN BROTHERS COMPANY, a Corporation, Plaintiff and Respondent, v. LINDEN INVESTMENT COMPANY, a Corporation, and Joseph Power and E. I. Donovan, Defendants, and E. I. DONOVAN, Appellant.

(177 N. W. 114.)

Contracts — capacity cannot be questioned if dimensions are as specified — particular descriptions qualify those which are general.

In this case it appears that defendant Donovan owned two lots in Mowbray, North Dakota, and in the year 1908 he contracted with the plaintiff to construct on said lots a grain elevator of specified dimensions, in accordance with plans and specifications, to be of 40,000 bushels capacity. Donovan agreed to pay for the same \$7,000, excess freight \$240.27 and one sieve, \$20.50, making \$7,260.77. He has paid in all \$4,154.60. The balance due is \$3,106.17, for which judgment is ordered, with costs. The defense was that the elevator had not a capacity of 40,000 bushels. It is held: Particular descriptions qualify those which are general; that expressions of quantity must yield to particular descriptions; that descriptive words, with definite and certain meaning, control the expressions of quantity.

Opinion filed December 2, 1919. On Rehearing March 15, 1920.

Appeal from the District Court of Cavalier County, Honorable *Chas. M. Cooley*, Special Judge.
Modified and affirmed.
Geo. M. Price, for appellant.

"The name of the person by whom the claimant was employed, or to whom he furnished the materials, must be stated in the claim of the lien." Bloom, *Mechanic's Liens*, p. 381; *Hogan v. Bigler*, 96 Pac. 97; *Maderia Flume Co. v. Kendall*, 52 Pac. 304.

A mechanic's lien being a creature of statute, every step prescribed by statute must be shown to have been substantially followed, or the lien does not exist. *Stoltze v. Hurd*, 20 N. D. 412.

A party who sues on a special contract to recover compensation alleged to be due on its performance must show performance. 9 Cyc. 757-759; *Braseth v. State Bank*, 12 N. D. 486; *Kupper v. McConville*, 35 N. D. 622.

The mere fact of taking possession of the building does not of itself amount to an acceptance of the same by the owner, as having been erected according to the contract. *Anderson v. Todd*, 8 N. D. 158.

Kvello & Adams and *Jesse Van Valkenburg*, for respondent.

Every person for whose immediate use and benefit any building, erection, or improvement is made, having the capacity to contract, including guardians of minors or other persons, shall be included in the words "owner thereof." N. D. Rev. Codes 1905, § 6248; *Johnson v. Soliday*, 19 N. D. 465, 126 N. W. 99.

The owner shall be presumed to have consented to the doing of any such labor or the making of any such improvement, if at the time he had knowledge thereof, and did not give notice of his objection thereto to the person entitled to the lien. Rev. Codes 1905, § 6237; *Turner v. St. John*, 8 N. D. 245, 78 N. W. 345.

Where a lien statement contains all the requirements of law, it is not necessarily fatally defective because it contains more. *John Paul Lumber Co. v. Hormel*, 61 Minn. 303, 63 N. W. 718; *Lindquist v. Young*, 138 N. W. 28; *Barndt v. Parks*, 115 N. W. 197.

ROBINSON, J. The plaintiff brings this action to recover the balance for the construction of a grain elevator at Mowbray. For such construction Donovan agreed to pay \$7,000 and the excess freight over and above the cost of laying down the material at Wales, North Dakota. Such excess freight was \$240.27; one sieve was \$20.50; the total was \$7,260.77. Defendant paid, by check, \$4,000; he paid on freight \$144.60, and he was given credit for unloading stone \$10. The total

credit is \$4,154.60. The balance due is \$3,106.17, which is the sum plaintiff is entitled to recover, with interest from October 18, 1908, until July 1, 1915, at 7 per cent a year, and after that, with simple interest at 6 per cent a year.

As it seems, the demand of the complaint is for a lesser sum, but in this case, where the parties have answered and made positive proof of the amount due, the demand is immaterial. Comp. Laws, § 7680. The district court made findings and judgment against Donovan, and he appeals to this court and demands a trial *de novo*.

It is certain that in the year 1908 the elevator was built for and at the request of Donovan. It was completed and turned over to him on October 18, 1908, and he accepted it without any objection, and since then he has continued to use it, and if used to its full capacity, it has probably paid for itself every year. There is really no dispute concerning the facts, and the only defense is that the elevator has not a capacity of 40,000 bushels. It was built strictly in accordance with written plans and specifications and blue prints, and under the supervision of a party who represented Powers & Donovan. (46) Under the head "Size and Design" the specification reads thus: "The elevator is to be 32 x 39 feet on the ground and cribbed to a height of 45 feet to the eaves and 4 feet higher in the center above the eaves, making in all 49 feet." At the foot of the specification there is added this memoranda of agreement: "It is understood and agreed that these plans and specifications are a duplicate of the elevator that Honstain Brothers Company are now building at Langdon for the Farm Elevator Company, except that the farm elevator is to be 60,000 bushels capacity, and the elevator for the Linden Investment Company is to be 40,000 bushels capacity." Now it appears from computation that the metes and bounds of the elevator, as given in the specification, do include a number of cubic feet equal about 40,000 bushels, but because of partitions, bins, and a large hallway, the working capacity of the elevator was only about 35,000 bushels. And the contention is that under the terms of the written contract defendant was entitled to an elevator with a working capacity of 40,000 bushels, regardless of the specified dimensions or the metes and bounds. There is no showing that the Langdon elevator had a working capacity of 60,000 bushels, and the chances are that it had no such capacity, and there is no claim.

that, in making the oral contract for the elevator, a word was ever said concerning its capacity. It seems the capacity clause was inserted merely by way of description, and not as a contract to make the elevator wider, longer, or higher than the specified number of feet. If the elevator had varied from the particular description—the width, the length, and the height, as given in the specification—then the plaintiff might have objected that it did not conform to the contract. In such a case the particular description controls that which is general.

Maxim, § 7268. "Particular expressions qualify those which are general." "Thus in conveyances of land the words merely expressive of quantity must yield to a particular description by metes and bounds." 27 Cyc. 1138. "The statement of quantity is considered the most uncertain of a description, and when inconsistent with boundaries, courses, and distances, quantity must be rejected." *Kruse v. Scripps*, 11 Ill. 98.

"In conveyances, descriptive words, when definite and certain, are to be looked to rather than words expressing quantity." *Maguire v. Bissell*, 119 Ind. 345, 21 N. E. 326.

Clearly it was not the intention of the parties to contract that the specified length, width, and height of the building should be extended so as to make it contain a specified number of bushels. If such had been the intention, then it should have been clearly expressed in words. Hence, on all the evidence, we must conclude that the building was constructed in accordance with the contract and the plans and specifications.

Concerning the mechanic's lien, there is some question as to its validity, but it is of slight importance, as the defendant is perfectly responsible, and he has given bonds to pay the judgment. However, it appears that Donovan owned the lots on which he caused the building to be constructed, and, under the statute, the plaintiff had a right to a lien on the lots and the building, even without the filing of a lien. The purpose of filing a lien is to give notice to subsequent purchasers and encumbrancers. The contract was to erect a building on lots 1 and 2, sec. 25, township 164 of range 61, in Cavalier county, North Dakota. The building was duly erected, and there is no question concerning the price, the excess freight, or the payments. For some eleven years Donovan has had the use of the good building and the use of the

balance due for a low rate of simple interest. His love of litigation must have been quite fully satisfied. Now the seal of the court should be given to his love of honesty. The judgment of the court must be that the plaintiff do have and recover from the defendant E. I. Donovan the sum of \$3,106.17, with simple interest on the same, at 7 per cent a year from October 18, 1908, to July 1, 1915, and after that, with simple interest at 6 per cent a year, with the costs of the action and the costs of the appeal; and that the plaintiff may issue a general execution for the collection of the same; also, that, for the amount so adjudged to be due, the plaintiff shall have a lien on said lots 1 and 2, and may cause the same to be sold under a special execution, as provided by law.

Let judgment be entered accordingly.

Modified and affirmed, with costs.

CHRISTIANSON, Ch. J., concurs.

GRACE, J. I concur in the result.

BIRDZELL, J. In my opinion the judgment appealed from should be affirmed without modification.

BRONSON, J. I dissent. In my opinion the majority opinion is attempting to demonstrate that two and two make something different than four. Further than that in accordance to the holding of the majority opinion, there is awarded to the plaintiff a greater amount than he demanded in the complaint even after the complaint was amended by the plaintiff in the trial court increasing the amount thereof. As I understand it this court, in the exercise of its original jurisdiction, must consider the record upon the issues as framed, upon pleadings submitted in the trial court, and that it is neither the time nor the place in this court to frame new issues or to submit new pleadings.

This is an action to recover the balance due for the construction of an elevator and to foreclose a mechanic's lien thereupon. From a judgment of the district court entered in favor of the respondent and against the appellant, Donovan, for \$3,451.66, interests and costs included,

and for foreclosure of mechanic's lien thereupon, the defendant Donovan has appealed and demands a trial *de novo*. In August, 1908, the respondent entered into contracts for the construction of an elevator of 40,000 bushels capacity, at Wales, North Dakota, and for a duplicate elevator, at Mowbray, North Dakota, of like capacity. The construction price agreed upon for the elevator at Wales, North Dakota, was \$7,000 and for the elevator at Mowbray, North Dakota, likewise \$7,000, plus excess freight charges for securing the delivery of materials at said Mowbray. These elevators were constructed in the year 1908. Difficulties having arisen between the parties concerning the payment of the construction prices, the respondent filed a mechanic's lien against the elevator at Wales, claiming a lien upon such elevator in the sum of \$2,199.63, principal, as against the Linden Investment Company, as owner of the property and the party chargeable with the debt for the construction thereof. Said respondent also filed a mechanic's lien against the Mowbray elevator, upon the building alone, for the sum of \$2,106.17 principal, as against said Linden Investment Company as the owner thereof and the party chargeable with the debt. Thereafter, in the circuit court of the United States, an action was commenced by the respondent against such Linden Investment Company, setting up two causes of action, seeking to recover the balance of the construction debt for each of such elevators and for the foreclosure of the respective mechanics' liens thereupon. In that action, the Investment Company answered, presenting the issue that, as to the first cause of action concerning the Wales elevator, the construction thereof was not pursuant to contract in that the elevator, as constructed, was of less capacity than that agreed upon between the parties, and that, as to the second cause of action, the appellant herein, Donovan, was the person with whom the respondent made the contract, and chargeable with the debt.

After the trial in the United States circuit court, judgment was finally rendered in May, 1913, against the Linden Investment Company upon both causes of action, for \$3,614.57, being principal and interest less \$1,270 damages, for failure of the respondent herein to construct the elevator pursuant to contract.

This case appealed to the United States circuit court of appeals, and, subsequently, in January, 1916, the judgment of the United

States circuit court was modified (see 136 C. C. A. 121, 221 Fed. 178, 181); the judgment, covering the second cause of action upon the Mowbray elevator, was dismissed without prejudice to commence another action; the judgment concerning the first cause of action upon the Wales elevator was affirmed and judgment ordered for \$1,367.92 (with interest included, being \$1,807.19, or one half of the award made in the circuit court). This judgment so rendered necessarily included a deduction of \$635 allowed for damages through failure to construct pursuant to contract. This action accordingly was subsequently commenced in July, 1914, in the district court of Cavalier county, against said Linden Investment Company and the appellant herein, Donovan, to recover for the construction price of such Mowbray elevator, and for the foreclosure of the mechanic's lien thereupon. Trial was there had in December, 1917. Subsequently, in March, 1919, the trial court made its findings and conclusions determining the amount of the indebtedness due the respondent to be \$3,106.17, from which should be deducted \$900 as an offset, for damages sustained by the appellant for the failure to construct the elevator pursuant to contract, but, as the amended complaint demanded only the sum of \$2,845.40, judgment accordingly was ordered for the respondent, and against the appellant, for \$1,945.40 principal, instead of \$2,206.17, and for foreclosure of the lien. The action was dismissed as to said Linden Investment Company. From the judgment so entered on such findings, this appeal is prosecuted. The appellant caused to be filed a supersedeas bond and a bond under § 7709, Comp. Laws 1913. Pursuant thereto the trial court, in January, 1919, released this judgment against the appellant as a lien upon his real estate in Cavalier county, North Dakota. The appellant herein challenges the judgment so rendered in the trial court, principally upon the ground that the trial court has erroneously computed the amount due the respondent, and has failed to give credit to the respondent for \$803.29, that has been paid and received by the respondent upon the debt involved in the construction of these elevators, and upon the further ground that the lien of the respondent is invalid, and that by reason thereof the appellant was entitled to a jury trial. The appellant concedes that the dismissal of the action as against the Linden Investment Company was correct. The question before this court therefore involves, principally,

a problem in arithmetic. The respondent contends that the correct amount due for the Mowbray elevator is \$3,106.17. The appellant contends that the correct amount due is the sum of \$2,302.88, less whatever amount should be deducted for failure to construct in accordance with the contract. Various computations are made in the briefs.

Manifestly the amount that the respondent should be entitled to receive for the construction of these elevators is the contract price for both of them less the amount that has been paid upon such construction price, by personal payments, through the judgment of the United States courts, or by deductions to be made concerning the Mowbray elevator for failure to construct in accordance with the contract. The respondent does not dispute the statement rendered by it covering the balance due for the construction of these elevators, which was the basis of the causes of action instituted in the United States circuit court. This statement is as follows:

Contract at Wales, N. Dak.	\$7,000.00	
Tester & Sieves	20.50	
		<hr/>
		\$7,020.50
Contract at Mowbray, N. Dak.	\$7,000.00	
Tester & Sieves	20.50	\$7,020.50
		<hr/>
Extra freight at Mowbray		240.27
		<hr/>
		\$14,281.27

Credits.

Freight paid at Wales	\$820.87	
Freight paid at Mowbray	144.60	
		<hr/>
Sept. 14th check	1,000.00	
" 19th "	1,000.00	
Oct. 9th "	1,000.00	
" 17th "	2,000.00	
Nov. 10th "	4,000.00	
Unloading 2 cars stone	10.00	9,975.47
		<hr/>
Balance		\$4,305.80

This showed a balance of \$4,305.80, unpaid principal. In the United States courts, the amount due for the Wales elevator is finally determined to be \$2,002.92, less \$635 damages, leaving as a net amount \$1,367.93 principal. Clearly this amount was paid pursuant to the Federal judgment on such balance existing for the construction of both of said elevators. This accordingly left a balance of \$2,302.88. The trial court was awarded \$900 for breach of the construction contract through failure to construct at Mowbray an elevator of the capacity agreed upon. The trial court has determined that the specifications in the contract for the construction of the elevator at Mowbray covering the specific sizes of such elevator did not express the real agreement of the parties, for the reason that such specifications as to the dimensions provided for an elevator of only 32,000 bushels capacity, instead of 40,000 bushel capacity, as the parties really intended and so agreed; and that the appellant, Donovan, relied upon the assurance and representations of the respondent in regard to such contract concerning the capacity of the elevator to be constructed. In view of the controverted questions of fact in the record we are not disposed to disturb the finding of the trial court in that regard.

The following is therefore the statement of the account between the parties, viz.:

Dr.	Balance due for construction of both elevators pursuant to statement rendered by respondent, principal	\$4,305.80
Cr.	Federal court judgment	
	Principal	\$1,367.92
	Damages	635.00
	Total	\$2,002.92
	Damages for failure to build elevator at Mowbray of the agreed capacity, as allowed by trial court	900.00
	Total	\$2,902.92
	Balance due, principal,	\$1,402.88

The question of the validity or invalidity of the mechanic's lien is immaterial in this appeal. The real question of litigation is

court is the amount due the respondent; the lien of the judgment by the trial court already has been released by the filing of the bond mentioned. The appellant did not specifically request a trial by jury for the appellant, Donovan, in the trial court. Even though the lien were invalid, a money judgment might be approved and affirmed before this court in such action. *McCormack v. Phillips*, 4 Dak. 506, 34 N. W. 29; *Moher v. Rasmusson*, 12 N. D. 71, 74, 95 N. W. 152; *Smith v. Gill*, 37 Minn. 455, 35 N. W. 178; 27 Cyc. 473. The judgment of the trial court should be modified and be entered as modified in the trial court for the sum of \$1,402.88, with interest thereupon at 7 per cent per annum from October 14, 1908, until July 1, 1915, and at the rate of 6 per cent per annum since July 1, 1915, together with the costs in the district court, but neither party should recover costs in this court.

PER CURIAM. In this action a rehearing was ordered. On the reargument defendant contended that the former decision is erroneous:

1. Because it modifies the judgment appealed from, in this, that it finds that the defendant is not entitled to the \$900 allowance for damages which was made by the trial court.
2. Because it fails to allow the defendant a credit for \$803.29, which it is contended the plaintiff was overpaid by the Linden Investment Company in the action in the United States district court. In other words, it is contended that the judgment of this court should be that proposed in the dissenting opinion.

The majority members have again considered the evidence in the case, and it may not be amiss to make further reference to some of the facts which were not alluded to in the former opinion.

In the fall of 1908, the plaintiff company was engaged in constructing an elevator for the Farmers Elevator Company, at Langdon, in which city the defendant Donovan resides. Donovan, who was secretary of the Linden Investment Company, approached Arthur E. Honstain, who represented the plaintiff and was in charge of the construction of the elevator at Langdon, to ascertain if the plaintiff company would build an elevator for the Linden Investment Company at Wales, North Dakota. Donovan stated that he wanted an elevator at Wales exactly like the one which was being constructed at Langdon, except that the Wales elevator was to be of smaller capacity. The Langdon

elevator was supposed to be of 60,000 bushels capacity, and Donovan stated that he wanted only a 40,000 bushel capacity house. Honstain stated to Donovan that he believed he had some plans in his trunk of an elevator of the kind and size suggested. The plans were produced and a contract was made between the plaintiff company and the Linden Investment Company for the construction of the Wales elevator according to such plans and specifications. A written memorandum of agreement was thereupon entered into. The plans and specifications were attached to and made a part of the agreement. The written agreement, among other things, provided that "it is understood and agreed that Linden Investment Company are to have an authorized representative on the ground, as soon as the building is completed, to inspect and receive the same." Donovan indorsed upon the back of one of the pages of the specifications the following written statement with an indelible pencil: "It is understood and agreed that these plans and specifications are a duplicate of the elevator that the Honstain Brothers Company are now building in Langdon for the Farmers Elevator Company, except that the Farmers Elevator is to be 60,000 bushels capacity and the elevator for the Linden Investment Company is to be 40,000 capacity."

While the Wales elevator was being constructed, Donovan arranged with the plaintiff to build an elevator at Mowbray. It was understood that the Mowbray elevator was to be exactly like the Wales elevator, and that the plans and specifications and the contract relative to the Wales elevator should govern as to the Mowbray elevator, with the exception of certain specified additional freight charges which it was understood the plaintiff was to be paid. The elevators were both constructed and turned over to the possession of their respective owners in October, 1908. Certain payments were made upon both elevators, but substantial amounts remained unpaid. It appears from certain correspondence in evidence that the plaintiff, from time to time, requested payment of the balance claimed due. It is undisputed that in the early part of November, 1908, Donovan, at plaintiff's office in Minneapolis, Minnesota, paid to it \$4,000, and indicated that the balance would be paid soon. Under date of December 24, 1909, he wrote in effect promising payment soon. Shortly thereafter the plaintiff company

served notice of intention to file mechanics' liens, and later filed such liens.

It appears that the plaintiff supposed that both elevators were built for the Linden Investment Company, and it filed liens against that company. Later plaintiff commenced an action against the Linden Investment Company in the United States district court of this district for the foreclosure of the two liens. The Investment Company, by way of defense, asserted that it had not contracted for and that the Mowbray elevator had not been built for it; that the Wales elevator did not comply with the construction contract for various reasons, among others, that it did not have a 40,000 bushel capacity. Upon the trial in the Federal court, and upon the trial of this action, the defendant Donovan testified that the Mowbray elevator was built under a contract with him as an individual, and not as an officer of the Linden Investment Company. The trial in the Federal court resulted in a judgment in favor of the plaintiff foreclosing both liens, but allowing a deduction upon the two elevators in the sum of \$1,270, by way of damages for failure to construct the elevator according to contract. An appeal was taken to the circuit court of appeals. In the decision rendered in the case, the circuit court of appeals said: "This is an appeal from a decree of foreclosure of two mechanics' liens upon two elevators in North Dakota, situated respectively at Wales and at Mowbray. It is based upon a complaint upon two separate causes of action,—one for the foreclosure of an alleged mechanic's lien upon the Wales elevator, and the other for the foreclosure of a mechanic's lien upon the Mowbray elevator. Each cause of action is entirely separate and independent of the other. It is conceded in this court that there was no error in that part of the decree which establishes and forecloses the alleged mechanic's lien upon the Wales elevator, but the portion of the decree which adjudges the defendant below, the Linden Investment Company, a corporation, indebted to the plaintiff below, Honstain Brothers Company, a corporation, on account of the Mowbray elevator, establishes a mechanic's lien upon it, and adjudges a foreclosure thereof, is assigned as error." 136 C. C. A. 121, 221 Fed. 179.

The circuit court of appeals sustained the contention of the Investment Company, with the result that the judgment of the district court as to the first cause of action was affirmed, but reversed as to the second

cause of action. Upon the cause being remanded to the trial court, judgment was entered in conformity with the order of the circuit court of appeals, foreclosing the lien against the Wales elevator, but dismissing the second cause of action, that is, the cause of action for the foreclosure of the mechanic's lien against the Mowbray elevator. The plaintiffs thereupon brought this action to foreclose the latter lien, in the district court of Cavalier county.

As stated in the former opinion in this case, the plans and specifications under which the elevator was constructed gave the dimensions of the same, and every part thereof, in detail. It gave the number of sizes of the bins. At the time the Mowbray elevator was being constructed, one Powers, Donovan's partner, was present to inspect the job. No complaint or suggestion was made that the elevator was of insufficient capacity. It was not a difficult matter to determine what the capacity was. This is demonstrated quite graphically by Donovan's own testimony. He said: "Well, it will hold between 32,000 and 83,000 bushels, as much as you can put into it, or taking all the ways that we had of determining how much it would hold by the three methods which I have named. *The plans speak for themselves and it doesn't require much of a scholar to compute it.*" The defendant received the elevator and operated it through his representative. Under the terms of the memorandum agreement Donovan was supposed to "have an authorized representative on the ground as soon as the building (was) completed, to inspect and receive the same." He had a representative there. The building was received and put to its intended use. There was no complaint until after the mechanics' liens had been filed. And, according to Donovan's own explanation, the provision which he wrote on the back of one of the pages in the specifications was written there primarily to insure that the elevator would be, as far as possible, a duplicate, on a smaller scale, of the elevator at Langdon. He explained as his reason for this that he knew that the plans for that elevator had been carefully considered by a committee selected for that purpose. Hence, he was willing to, and desired to, have a similar but smaller elevator. The reference to the capacity seems to have been incidental, and for descriptive rather than for other purposes. Nowhere does it appear that any particular stress was laid on the capacity,—and of course, as Donovan well said, "*The plans*"

speak for themselves and it (didn't) require much of a scholar to compute" the capacity. It would seem that when the building was turned over, and accepted, Donovan got precisely the building he expected to get when he contracted; and that in any event, under all the circumstances, he should be deemed to have waived all objections. We adhere to the conclusion reached in the former opinion on this phase of the case.

But it is asserted that it appears that the judgment rendered by the Federal court for the foreclosure of the lien against the Wales elevator was in fact for more than was actually due on the account, and that when the Linden Investment Company paid that judgment it paid the plaintiff company \$803.39 more than was owing for the construction of such elevator. And it is contended that the defendant Donovan should be allowed the benefit of such overpayment in this case. Of course the Linden Investment Company and Donovan are two separate persons. This was asserted to advantage in the action in the Federal court. And it will be noted that the decision of the circuit court of appeals specifically pointed out that that action was "based upon a complaint upon two separate causes of action,—one for the foreclosure of an alleged mechanic's lien upon the Wales elevator, and the other for the foreclosure of a mechanic's lien upon the Mowbray elevator. *Each cause of action is entirely separate and independent of the other.*" The evidence taken in the Federal court was also submitted by stipulation upon the trial of this action, and it appears therefrom that the matter of amounts and application of payments was gone into quite fully.

It seems clear that if the Federal court made a mistake, and rendered judgment against the Linden Investment Company for too large an amount, that fact cannot avail the defendant Donovan in this action. The Linden Investment Company is not a party to this appeal. It was, however, a party to the action in the court below. It appeared and interposed an answer, and upon the trial was represented by the same counsel who appeared for Donovan. The answer contained no averment that there was any mistake in the judgment of the Federal court, or that the Linden Investment Company had in any manner overpaid the plaintiff. The answer did, however, plead with considerable detail the facts relative to the suit in the Federal court, and the judgment rendered

therein, and averred that, by reason of said judgment the plaintiff "is estopped and foreclosed from further litigating said question (the question of liability of the Linden Investment Company for the construction of Mowbray elevator), or any question in this case."

We adhere to the conclusions reached in the former decision.

CHRISTIANSON, Ch. J., and ROBINSON and GRACE, JJ., concur.

HENRY RENFELDT, Appellant, v. BRUSH-McWILLIAMS COMPANY, a Corporation, and the Western Bankers Investment Company, a Corporation, Respondents.

(176 N. W. 838.)

Contracts — rescission on grounds of intoxication at time of signing.

1. To rescind a contract upon the ground of intoxication of the maker, the evidence must disclose that he was in such a degree of intoxication, at the time, so as to thereby render him entirely incapable of understanding the nature and effect of the transaction.

Contracts — rescission — intoxication must be such as to render party entirely incapable of understanding the nature and effect of the transaction.

2. In an action to rescind certain contracts, notes and mortgages, made in connection with the sale of land, upon ground of intoxication, it is *held*, upon the record, that the evidence does not affirmatively show that the maker was so intoxicated, as to make rescission, under the rule stated.

Opinion filed January 16, 1920. Rehearing denied March 15, 1920.

Action of rescission in District Court, Ward County, *Leighton, J.* From a judgment of dismissal, the plaintiff has appealed and demands a trial de novo.

Affirmed.

NOTE.—That a person cannot escape liability upon a contract upon the mere ground that he was intoxicated at the time of its execution, unless it is proved that he was so intoxicated that he was unable to understand the nature of the contract and the consequences, will be seen by an examination of the cases collated in notes in 54 L.R.A. 440; 25 L.R.A.(N.S.) 596; and L.R.A.1915B, 1121.

On degree of intoxication which will afford grounds for rescission of a contract, see note in 107 Am. St. Rep. 536.

Halvor L. Halvorson and Greenleaf & Woledge, for appellant.

An agreement, other than for necessities, made by a person when so drunk as to be incapable of understanding its nature and effect, is voidable at the intoxicated person's option. *Johnson v. Harmon*, 94 U. S. 371, 24 L. ed. 271; *Thackerah v. Haas*, 119 U. S. 449, 30 L. ed. 486; *Conley v. Nailor*, 118 U. S. 127, 30 L. ed. 112, 6 Sup. Ct. Rep. 1001; *Cecil v. St. Dennis*, 14 Pa. 184; *Straughan v. Cooper*, 41 Okla. 515; *French v. French*, 8 Ohio, 214.

Courts of equity will interfere and rescind such contracts not alone on the ground of intoxication and incapacity to contract, but upon the ground of fraud. *Calloway v. Witherspoon*, 40 N. C. (5 Ired.) 128; *Burch v. Scott*, 168 N. C. 502; *Hotchkiss v. Fortson*, 7 Yerg. (Tenn.) 67; *Crane v. Conklin*, 1 N. J. Eq. 346.

The contract will be avoided or voidable if the person, at the time of its execution, was so far under the influence of intoxication as to be unable to understand the nature or consequence of his acts and unable to bring to bear upon the business at hand any degree of intelligent choice or purpose. *Cook v. Bagnell Timber Co.* 78 Ark. 47; *Pickett v. Sutter*, 5 Cal. 412; *Curtis v. Kirkpatrick*, 9 Idaho, 629; *Bates v. Ball*, 72 Ill. 108; *Wilcox v. Jackson*, 51 Iowa, 208, 1 N. W. 513; *Drefahl v. Security Sav. Bank*, 132 Iowa, 563, 107 N. W. 179; *Kuhlman v. Weiben*, 129 Iowa, 188, 2 L.R.A.(N.S.) 666, 105 N. W. 445; *Spoonheim v. Spoonheim*, 14 N. D. 380; *Powers v. King*, 18 N. D. 600.

Bradford & Nash, for respondents.

BRONSON, J. This is an action to rescind a contract, certain notes, and mortgages, upon grounds of intoxication. In the trial court, judgment was rendered dismissing the action. The plaintiff has appealed and demands a trial de novo. Substantially the facts are as follows:

The defendants are corporations, somewhat closely affiliated, engaged in business in Minot. For some four years, prior to the transaction involved herein, the plaintiff had rented and farmed a large farm near Minot, leased to him through the defendants, Brush-McWilliams Company. This defendant was his financial adviser. For some time also, anterior to the transaction herein, the plaintiff had conducted a coal and feed business at Minot.

45 N. D.—15.

Some four years before the transaction herein, one Boden and one Bustard had acquired an interest in a half section of land (the land involved herein), through the Brush-McWilliams Company.

In February, 1916, the plaintiff and Boden had negotiations concerning the sale of this half section of land and the coal and feed business of the plaintiff. At the time Boden and Bustard were indebted to the defendants in an amount exceeding the consideration demanded for the land. The plaintiff bought the land for the consideration of \$14,000. The defendants financed the transaction. The plaintiff and Boden, in their testimony, claim that the transaction was to and through the Brush-McWilliams Company, as principal. The defendants claim in their testimony that they acted solely as middlemen in financing the transaction.

In any event, the transaction was accomplished by the plaintiff assuming a \$5,000 mortgage on the land, executing promissory notes for \$8,000 secured by a second mortgage upon the land and a chattel mortgage upon the defendant's personal property, running to the defendants, and by turning over an order for \$1,000 upon Boden and Bustard to the defendants, the consideration for the sale of his coal and feed business. Boden and Bustard delivered a deed of the land to the defendants. They, with authority, as they assert, filled in the name of the plaintiff as grantee therein and recorded the same; Boden and Bustard were released, by or through the defendants, of securities and obligations held by them, to the amount of \$14,000.

These negotiations and transactions occurred approximately between the dates February 26, 1916, and March 3, 1916. On February 28, 1916, a written agreement was made by Boden and Bustard to transfer the land to the Brush-McWilliams Company for a consideration of \$14,000 to be paid by the company assuming the mortgages and encumbrances, in that amount on the premises. On the same date, another written agreement was made by the Brush-McWilliams Company to transfer such land to the plaintiff for a consideration of \$14,000. Likewise on the same date such company made a written agreement to furnish the plaintiff, in case it should be necessary, for the season of 1916, sufficient money for seed and for living expenses. On the same date, the notes and mortgages were made. On February 29, 1916, the deed was executed. On the same date a written agreement was

made between Boden and Bustard and the plaintiff to sell the coal and feed business for \$1,000 plus the inventory price of the coal and feed stock. On this same date the order for \$1,000 was given by the plaintiff. Boden and Bustard paid the defendants the amount remaining due from them on their indebtedness. The plaintiff then received from Boden and Bustard \$486.71 for the inventory price of the coal and feed stock. Other details of the settlement were then adjusted.

The plaintiff alleges and asserts that the record discloses drunkenness on his part, existing at the time these negotiations and transactions took place, to such an extent as to demonstrate legally the inability of the plaintiff to understand and comprehend the transactions had; that by reason thereof rescission should be permitted through advantage and overreaching obtained on the part of the defendant; that, in any event, the record further discloses such undue influence and undue advantages taken of the plaintiff as to warrant rescission.

The record amply shows that the plaintiff at the time of the negotiations and for a considerable period of time, anterior thereto, was and had been a drinking man; that both Boden and the plaintiff were indulging considerably in the use of intoxicating liquors through the period of negotiations. There is some testimony in the record that the plaintiff did not know what he was doing and that he was quite drunk at the time of these negotiations, but the testimony concerning the intoxication of the plaintiff, so far as it affected his ability to understand and comprehend what he was doing, must be considered in the light of the surrounding circumstances. His wife testifies that when she signed the notes the plaintiff was there; that he was then drunk; that he had been nothing but drunk for two years straight; that she had not seen him very much more sober for two years than he was that day; that he was always drunk. The record does disclose that the plaintiff was able to get about; that he discussed these negotiations with an attorney (not his attorney); that they proceeded for many days. In accordance with his own testimony, during these negotiations and prior to the time the contracts and papers were signed, he went out to see the land with a view to purchasing it. He says then that he was practically sober; that he talked with Boden of the consideration; that the amount was \$14,000; that he went to see the Brush-McWilliams

Company to finance it, and that they promised to finance it. These acts do not show deprivation of reasoning or understanding.

Shortly after these negotiations, in accordance with the plaintiff's testimony, he became sober or more sober; he went out to take a look at the land; he discovered that he had made a poor deal; he went to see the defendants and told them that he wanted to back out. The defendants offered then to give him another quarter section of land out in the hills, but this was not satisfactory. Later, on April 3, 1916, he caused to be served, in writing, a notice of rescission.

It is deemed unnecessary to review in detail the evidence concerning the manner or extent of the plaintiff's drinking: The sole ground for rescission, upon this record, is primarily based upon intoxication of the plaintiff, existing at the time of the negotiations. In the proof we are satisfied that there exists no ground for a finding of unconscionable conduct, or overreaching, unless it be upon the ground of plaintiff's intoxication.

The trial court, in a memorandum letter, has, in effect, found that the grounds of rescission, on the part of the plaintiff, even though they existed, applied only to Boden and Bustard, and not to the defendants, who agreed to finance the plaintiff in this deal. We, however, are of the opinion that the grounds of intoxication are sufficient, if established, to apply to the obligations of the defendants as well as to the contract obligations, if any, with Boden and Bustard.

In previous cases, this court has laid down the rule that to set aside a contract upon grounds of intoxication, it must be shown that the person was so intoxicated as to be incapable of understanding the nature and effect of the transaction. In effect, his drunkenness must be so excessive as to utterly deprive him of his reasoning and understanding, and so as to render him incapable of knowing the effect of what he was doing. Any degree of intoxication less than this affords no grounds for release in the absence of fraud on the part of the other party. *Power v. King*, 18 N. D. 600, 602, 138 Am. St. Rep. 784, 120 N. W. 543, 21 Ann. Cas. 1108; *Spoonheim v. Spoonheim*, 14 N. D. 381, 104 N. W. 845. Upon this record, reviewing the same for purposes of a new trial, we are of the opinion that the plaintiff has failed to so establish sufficient grounds of excessive drunkenness existing at the time so as to permit rescission, under the rule stated.

Judgment of the trial court, therefore, should be and is affirmed, with costs to the respondents.

CHRISTIANSON, Ch. J., and BIRDZELL, J., concur.

GRACE, J. (dissenting). The plaintiff brought this action to rescind the contract. The testimony in this case shows the following facts or circumstances, from which the existence of the fact is naturally and irresistibly inferred. It shows, indisputably, that plaintiff, for a period of two years or more prior to the time of the transaction in question, was an habitual drunkard; that this fact was known to the defendants, with whom he had continuously done business during that time. He had rented a large tract of land from them, had deposited his money with the First International Bank, and his transactions with all of them were so numerous that they knew him thoroughly and well. They knew that he was an habitual drunkard.

The testimony of Boden shows that, during the 27th, 28th and 29th of February, 1916, plaintiff was drunk all the time; that he was drunk to such an extent that his judgment would not be very sound.

This question was asked Mr. Boden:

Q. Did you get him drunk for the purpose of sloughing this land onto him?

A. Well, I could answer that awful good, but I do not believe I want to.

Q. Could you answer it truthfully?

A. Yes, sir, I could.

Q. Go ahead and answer it.

A. Well, I do not think it would do any good to answer it.

The Court: We would like to have the facts.

A. It simply did not amount to anything, I don't think. I think it would just—

The Court: Let me judge that.

A. Well, sir, I did.

This question was asked H. J. Halvorson, an agent or officer of the defendants:

Q. Did you have anyone acting for you outside of your officers, out-

side of your own company, in this transaction with Mr. Renfeldt?

A. Boden.

Mrs. Renfeldt, defendant's wife, went into Brush-McWilliams Company to sign some papers in connection with the deal. She testified that Henry (her husband) was there at the time. This question was asked her:

Q. What condition was he in?

A. He was drunk; he had not been nothing but drunk for two years straight.

Q. Was he drunker than usual?

A. Well, I never saw him sober for two years.

Q. You saw him more sober for two years than he was that day?

A. Not very much; he was always drunk.

Q. You know he was drunk at that time?

A. I know he was drunk; awful drunk.

Q. Did anyone else state that he was drunk, to you?

A. Nobody there, I guess; I do not think so.

Q. Who was present when you signed the papers, if you remember?

A. That fellow in the bank.

Q. What is his name? Fred Anderson?

A. A big tall fellow in the bank.

Elmer Evanson, who was employed by Renfeldt in the coal yard, testified as follows:

Q. Did you see him (Renfeldt) during the three or four days while they were dealing on the coal yard, and the different interests?

A. Yes, sir.

Q. See him with Boden at times?

A. Yes, sir.

Q. See him when Boden was not with him?

A. Yes, sir.

Q. Several times a day?

A. Yes.

Q. During the 27th, 28th, and 29th of February?

A. Yes.

Q. Was he drinking or sober during that period?

A. Drunk.

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Q. Well, was he drinking or was he drunk almost to stupefaction?
 A. Why, he was able to walk, but pretty drunk.

Q. *Too drunk to act rational and use judgment, was he, in your opinion?*

A. *In my opinion, he was.*

Q. You figure that he could not judge the effect of a business transaction, involving the transfer of properties, and signing of notes, in the condition he was during three days?

A. I do not think he could.

Q. That is your opinion, based on observation of him?

A. Yes, sir.

Q. You say you were working for him at his coal yard?

A. I was working for him.

Q. You saw him a good many times each day?

A. Four or five times each day; sometimes, more than that.

Q. In the evening, too?

A. Yes, sir.

In cross-examination, the defendant was asked this question:

Q. You have no recollection of having made this deal at all?

A. Some, yes.

Q. Will you tell just what recollection?

A. I could not do it; it seems like a dream.

Q. Just like a dream?

A. Yes.

Some more of his testimony on the cross-examination is as follows:

Q. Now, you recollect the day that the settlement was made between Mr. Boden and the bank?

A. No, sir.

Q. You were right there in the bank, at the time it was made, wasn't you?

A. I do not think so.

Q. And didn't yourself and Mr. Boden and myself go from there down to your office, and proceed with a settlement on the coal business?

A. Not that I remember of.

Q. And did not we go from there to Bob Gillespie's office, and there, close it up, finding out about insurance, etc., and then did I not give you a check for something like \$400, in settlement of it?

A. I do not remember of it.

Q. You do not remember anything about it?

A. No, sir.

Q. Do not remember now of receiving that check?

A. No, sir.

Q. Do not remember of signing it?

A. No, sir.

Q. Have you no recollection of it at all?

A. No, sir.

Q. And you have no recollection of talking about a certain kind of coal down there, known as black diamond coal?

A. Never paid no attention to it. Mr. Dill was doing my business.

Q. You did not have any conversation with Mr. Boden or him, about those propositions?

A. I might have had some kind of conversation; I do not remember it.

Q. You and Mr. Boden did not go over to Bob Gillespie's office?

A. I do not remember of ever being in his office with you, at all.

Q. *You do not, you do not—you did not make that settlement yourself, without the aid of Mr. Dill, at all, over at Gillespie's office?*

A. *Not that I remember of.*

Q. And you have no recollection of being in the bank that afternoon, when the settlement was made in the bank, between Mr. Boden and the Brush-McWilliams Company?

A. I have a kind of a slight recollection of being there off and on.

Q. Was your wife there that day?

A. She was there one day; I do not remember which day.

The answer of the defendants alleges that the plaintiff is a constant user of intoxicating liquors, and alleges that a serious quarrel with the members of his family was caused by his habitual use of liquor.

It appears, therefore, that the defendants had full knowledge and notice, and well knew, of the fact that the plaintiff was an habitual drunkard.

In the face of all the foregoing testimony, any testimony introduced by defendants, seeking to show that plaintiff was in a mental condition to do the kind of business transacted at the time the notes and mortgages in question were executed, is entitled to no credit. It indisputably

appears that the plaintiff was an habitual drunkard, and that he was so drunk at the time of the execution of the notes and mortgages in question that he could have had no judgment or understanding.

Some four years prior to this transaction, Boden and one Bustard had acquired an interest in this land, through Brush-McWilliams Company. At the time of this transaction it was claimed that Boden and Bustard were indebted to the defendants, in the sum of \$14,000 or more; the findings of fact of the trial court also shows this. In connection with this, however, it is well to cite some of Boden's testimony given in cross-examination.

Q. Mr. Boden, at the time you made this deal with Mr. Renfeldt, you were in the position where you had to sell this land?

A. No, sir, I did not have to sell.

Q. Is not it a fact, Mr. Boden, that that was practically the only chance you had in order to save your personal property?

A. Yes, it was, but they could not force me to sell it.

Q. They could not force you to sell it?

A. They tried to, and could not.

Q. But they could foreclose on your property?

A. Yes, I wanted them to do it, but they would not.

Q. You wanted them to foreclose their real estate mortgage?

A. Yes.

Q. You preferred to have these mortgages foreclosed rather than to sell the farm?

A. Rather than to settle the way they wanted to settle.

Q. That was prior to that time?

A. Yes.

Q. The sale, however, that you carried through, was satisfactory in every way?

A. Certainly.

Q. And there has been considerable talk of forcing you on the debts, and foreclosing the mortgage before that day?

A. I have tried to get them to do it, but they would not do it.

Q. You had tried to get them to do it?

A. Yes, sir.

Q. You mean to testify here in this court that you had tried to get

them to foreclose the mortgage, and they would not do it, told them to do it, and they would not do it?

A. Yes, sir.

Q. And you were on unfriendly terms with them?

A. No, sir, not at that time.

The defendants seek to show and assume the position that they had no interest in the deal, other than to finance it for Boden and Renfeldt. As we view the evidence, there was no deal between Boden and Renfeldt, and the defendants had a very material interest other than financing the deal, for the accommodation of the parties.

It appears, from Boden's testimony above, that there was very serious difficulty between him and defendants. Just what that difficulty was, the evidence does not disclose. But, from the statements of Boden, the only inference that can be drawn is that they were not in position to enforce their claims against him; that they did not dare to realize upon their securities they had against him, for his evidence shows he had requested them to do so; rather invited and welcomed an opportunity to have them endeavor to realize upon their securities. Their motive, then, it would seem, in bringing about this deal, Boden acting for them, was to relieve themselves of an unpleasant condition in which they found themselves with Boden.

Boden must have been a man who knew his rights and dared to maintain them, and the only conclusion and inference that can be drawn from his testimony is that these defendants did not dare to proceed against him. If, however, he could be released from his deal, and get out of the unpleasant condition, in which he undoubtedly found himself, by co-operating with the defendants, to saddle the deal on Renfeldt, he, of course, could have no further complaint against them; but the fact that after he did get released from his deal, and then testified as is shown above, demonstrates that his feeling is very deep against them, and must have rested upon some very substantial reasons.

As we view the matter, there is no merit in the claim of Brush-McWilliams Company, that they were merely acting to finance the deal. It is, on the other hand, very apparent they were acting in their own interest; they were making the deal for themselves, and Boden was acting for and with them, to assist them in making the deal. They were

primarily interested in the deal, and it was between them and Renfeldt, and not between him and Boden.

This case is before this court for trial *de novo*; it is a case in equity. It may be well, therefore, to state concisely the equities of the case. There is competent testimony to show that the land in question, at the time of the transaction, was not worth more than \$8,000. There is other testimony which shows it to be worth more, and perhaps some which places a value upon it as high as \$14,000. We think it is clear, from the testimony, that the land at that time was not worth more than \$8,000.

Let us assume, for the purpose of illustration, that it was worth \$14,000. Brush-McWilliams Company got the land back from Boden. There was a \$5,000 mortgage against it, and that left an equity in the land, in their hands, of \$9,000. They claim to have sold the land to the plaintiff for \$14,000. They took his notes, secured by a mortgage, on the land, and all the personal property, for \$7,000, and he turned in \$1,000 from the coal business, and he was to pay \$1,000 cash. In other words, he secured them in their full equity in the land \$9,000.

Shortly after the time of the transaction, the plaintiff had to move off the Kelly place; he absolutely refused to move to the land in question, and did not do so. It seems, however, that Mr. Halvorson acted for the defendants, or some of them, and made a deal with Mrs. Renfeldt to move to the place, and guaranteed to pay her for all the work she might do thereon. It appears that she was acting as their agent, and taking care of the personal property, etc.

As we understand the testimony, and as we remember the statements made in the argument, before this court, all the mortgages have been foreclosed, so that the plaintiff has nothing left; all of his personal property and interest in the land has been taken away from him. He has no further interest in any of it. His personal property was worth about \$8,000; his coal business, \$1,000; he has thus lost \$9,000.

Assuming the land to be worth \$14,000, if the defendants had taken all the personal property and given him credit therefor, for the proceeds of the coal business, and the cash payment, if it were paid, he would owe only \$5,000 on the land; he would have something left, some hope for the future; but, as we understand the situation, everything is gone, personal property, land, and all.

There is another loss he sustained, and which is irreparable. There is not a word of testimony in the record to show that prior to the time of making this deal, Renfeldt ever had any difficulty with his family. There is testimony that he drank intoxicating liquors, and was drunk for a period of two years, but not a syllable of testimony that during any of that time, or any time until after the present transaction, that he, in any manner, abused his family. In the state of the record, it must be assumed that there never had been any prior trouble.

Just as soon as Henry Renfeldt had finally sobered up and came out of the excessive drunken condition he was in, at the time he made this deal, and as soon as he realized what he had done, and when influence had been brought to get his family to move to the farm, trouble commenced in his home, and it never ceased until it terminated in a divorce from his wife. In other words, the entire family has become separated, and Henry Renfeldt is left stranded and alone upon the sands of time, to eke out the balance of his existence. This position is quite in contrast to that in which he was at the time, at the defendants' offices, he signed the notes, etc., while so drunk as to have no judgment or understanding, or to know and realize the consequences of his act.

The evidence clearly shows that he was in such a drunken condition, at the time of the transaction, that he could not exercise any free will or act, nor was his mentality such that he could know the consequences of such act. He was in no more condition to do business than if he had been violently insane.

When it is considered that the plaintiff had been drunk, *continuously drunk, for two years*, such drunkenness must not be looked upon alone as a reckless habit, but, in such circumstances, it becomes, and is, a disease, the ravages of which could no more be stayed by Henry Renfeldt than the progress of any other disease; and it is in this sense that the law throws its protection around such people.

As we view this testimony, Renfeldt, on the day or days of the transaction, was as drunk as one could be and be able to stand or navigate; if he were any drunker, he would have become unconscious or passed into a drunken stupor; and hence notes, mortgages, contracts, or whatever were signed by him, while in that condition, were of no effect, were absolutely void, for he had no capacity to contract. He could not understand the nature and effect of the transaction; he could not compre-

hend the consequences and effect of his acts. He was in no sense in such mental condition as to comprehend and understand the nature and effect of the large transaction, into which he was drawn, and events, which took place subsequent to it, unmistakably show this to be true.

After he had sobered and realized that he had made such a deal, he was crushed in spirit. He knew that he was wrecked and ruined financially, and he did the only thing that was left him, and that was to try to rescind the whole transaction.

This court of conscience should not look with favor upon this transaction; neither should it place thereon its stamp of approval. It should not close its eyes to the great injustice that has been done the plaintiff; it should not be deaf and dumb to his appeals for justice, and for the defense of his rights in his property. It should, by its decree, set aside the whole transaction, and compel these defendants to return plaintiff his personal property, and every dollar they secured him to put in this deal. He should be placed again at the point where he was when, in his drunken condition, he entered into this transaction. Nothing else will be justice.

If this were done, in what position would it leave defendants? They would not be out a single cent. They had sold the land to Boden, and held his paper and securities for \$14,000. When they canceled his obligations, they got the land back. It must be assumed, therefore, they had no loss in that transaction. If the transaction of Renfeldt is rescinded, they will still have the land; they would not be out a single dollar. The only difference is, there would be no sale of the land. If, however, they now have the land, and are permitted, in addition to that, to retain \$9,000, paid them by Renfeldt in property, etc., they are that much the gainers.

This court of equity should not approve this transaction. Every principle of justice and equity pleads in favor of the plaintiff. Law, and especially equity, should protect the weak.

In this transaction, on the one hand, were these defendants, corporations, whose officers and agents are intelligent, resourceful, active, and skilled in their business, and, at the time of this transaction, were in position to, and did, use such qualities in the completion of the transaction.

On the other hand, at the time of the transaction, the plaintiff was a

weak, drunken, unintelligent, and incompetent man, wholly unfit and incapable of entering into a contract of this character; and, as we view the testimony, could not and did not know the effect and consequences of such an act.

In these circumstances, equity should protect the plaintiff. His extreme weakness and total incompetency, at the time of the transaction, should not be permitted to result in such an extraordinary advantage to these defendants.

This court of equity should not exercise its powers to protect the acts of the strong against the weak, especially where that act is one which does not appeal to equity and good conscience, and, as we view the acts of the defendants, they certainly do not.

The fact that the defendants are strong business concerns, exercising great power in the life of their business community, and that the plaintiff, on the other hand, was an habitual drunkard, whose weakness was well known to the defendants, and which was taken advantage of, as the evidence shows, by Boden, the agent of defendants, designedly procuring his excessive drunkenness for the purpose of sloughing this land upon him, should not place the cause of defendants in a more favorable light before this court.

When the strong oppress the weak and incompetent, and take unjust and undue advantage of them, where wrong seeks mastery over right, justice should prevail, and the restraining hand of equity should intervene to protect the weak from such oppression and injustice.

In the name of the spirit of our jurisprudence, which affirms the equality of each, before the law, in the name of right, truth, and justice, in the name of equity and good conscience, I dissent from the conclusion and decision arrived at by the majority of my associates.

ROBINSON, J. (dissenting). I concur with all possible emphasis in the able dissent of Mr. Justice Grace. The Brush-McWilliams deal was clearly unconscionable. The plaintiff should not be robbed of some \$8,000, even though he was not very drunk when induced to sign the cut-throat contract.

DAHL IMPLEMENT & LUMBER COMPANY, a Corporation,
Respondent, v. E. A. CAMPBELL, P. J. Campbell, and Wm. Andrews and John Huffman, Appellants.

(178 N. W. 197.)

Corporations — soliciting of business generally by foreign corporation not an "isolated transaction."

In an action brought upon promissory notes given in payment for a second-hand threshing rig and to foreclose a chattel mortgage securing the same, where it appears that the plaintiff is a foreign corporation which has not complied with § 5238, Comp. Laws 1913, and where the defendants rely upon an attempted rescission of the contract for misrepresentation and fraud and also seek damages for breaches of warranty, it is *held*:

1. Where a foreign corporation, with its principal office in a town in a sister state near the state line, is shown to have solicited business generally in tributary territory within this state, any transaction consummated by it in furtherance of its business is not an "isolated" transaction within the rule that single or isolated transactions do not violate § 5238, Comp. Laws 1913, which prohibits the doing of business in this state by foreign corporations without first filing a copy of their charter.

Commerce — state constitutional and statutory provisions held not to authorize burdens on interstate commerce.

2. Section 136 of the Constitution, and §§ 5238, 5240, 5242 and §§ 4518 and 4521, Comp. Laws 1913, as amended by chapter 99 of the Session Laws of 1917, and chapter 4 of the Laws of the Special Session of 1918, all of which relate to the authority of foreign corporations to do business in this state and to the effect of the failure to secure the privilege and to file an annual statement with the secretary of state, are construed in the light of article 1, § 8, of the Constitution of the United States, relating to interstate commerce; and it is *held* that the state has no power to impose conditions, restrictions, or burdens upon interstate commerce in the absence of congressional authority.

Commerce — statute regulating foreign corporations will be construed to apply only to intrastate business.

NOTE.—As to whether a single isolated transaction by foreign corporation is doing business within the state, see note in 10 L.R.A.(N.S.) 693.

As to whether soliciting trade by foreign corporation is doing business within the state, see note in 9 L.R.A.(N.S.) 1214; 23 L.R.A.(N.S.) 834; L.R.A.1916E, 236; and 6 B. R. C. 801.

On sale by foreign corporation of goods stored in state as interstate business, see note in 18 L.R.A.(N.S.) 134.

3. Where a statute purports to prohibit a foreign corporation from "doing any business within this state," and its application to interstate commerce would impose a condition or burden upon interstate commerce prohibited by the Federal Constitution, the statute will be construed as applicable only to the transaction of intrastate business.

Commerce — foreign corporations "interstate commerce" held not prohibited by state statutes.

4. Where a foreign corporation sells within this state goods located in another state, where it has its principal place of business, which sale is followed by delivery and transportation to this state, the transaction is one in interstate commerce, which is not prohibited by the statutes above referred to.

Sales — evidence not showing seller's misrepresentation of fact, justifying rescission of contract.

5. The evidence is examined, and it is *held* that it does not warrant a finding of misrepresentation of fact which would justify a rescission of the contract.

Sales — evidence held to show warranty and seller's breach thereof.

6. It is further *held* that the defendants have established a warranty respecting the ability of the engine to do the work for which it was purchased, and damages for breach of that warranty.

Opinion filed March 24, 1920.

Appeal from District Court of Richland County, *Allen, J.*
Modified and affirmed.

W. S. Lauder, for appellants.

"A corporation can have no legal existence out of the boundaries of the sovereignty by which it is created," and the corporation can make no valid contract without the sanction, express or implied, of the sovereignty in which the contract is made." *Paul v. Virginia*, 8 Wall. 68-131; *Washburn Mill Co. v. Bartlett*, 3 N. D. 138; 2 *Morawetz, Priv. Corp.* § 958; *Waters, etc., Co. v. Texas*, 177 U. S. 28; *Reimers v. Seatco Mfg. Co.* 79 Fed. 373; 12 R. C. L. pp. 6 et seq. and the cases cited under note 12; *Doyle v. Continental Inst. Co.* 94 U. S. 355.

There is in this case no question of interstate commerce. 7 Cyc. p. 416, subd. 5; *State Freight Tax Case*, 82 U. S. 232; *American Starch Co. v. Bateman (Tex.)* 22 S. W. 771; *Erie R. Co. v. State*, 31 N. J. L. 531, 86 Am. Dec. 226.

"Interstate commerce would not include a contract for the sale of goods between citizens of different states, where no transfer of property from

one state to another was included in the transaction." *Reed v. Walker* (Tex.) 21 S. W. 677.

Inconsistent defenses may be pleaded in the same answer. *Lawrence v. Peck* (S. D.) 54 N. W. 808; *Stebbins v. Lardner* (S. D.) 48 N. W. 847; *Green v. Hughitt Twp.* (S. D.) 59 N. W. 224; *Irmsby v. Ins. Co.* (S. D.) 58 N. W. 301; *Minnesota Thresher Co. v. Schaaack* (S. D.) 74 N. W. 445; *Westphal v. Nelson*, 125 N. W. 640.

Wolfe & Schneller, for respondent.

BIRDZELL, J. This is an action brought upon two promissory notes which were given by the defendants in payment for a threshing rig purchased of the plaintiff in July, 1918, and to foreclose a chattel mortgage securing the notes. The defendants plead breaches of warranty, claiming also the right of rescission for misrepresentations and fraud. They also counterclaim, asking damages for the breaches of warranty. As a further and independent defense, it is alleged that the plaintiff is a corporation existing under the laws of the state of South Dakota, having its office and place of business at the village of White Rock, about 1 mile south of the state line separating the states of North and South Dakota. Also that for the period of approximately ten years the plaintiff had engaged in the business of selling agricultural implements, and at the time of the transaction in question was so engaged in transacting business in the state of North Dakota, employing agents and representatives to canvass within the state. It is averred that the sale of the rig in question to the defendants was a part of the general business carried on within the state of North Dakota, and that the plaintiff never complied with the laws of this state.

Upon the trial in the court below it was found that the plaintiff was a foreign corporation, and had not secured a license to do business in North Dakota; that the transaction in question was consummated in North Dakota, although the notes were dated and made payable at White Rock, South Dakota. It was found that this was the only business transaction on the part of the plaintiff in connection with which anything was done within this state. It was further found that there were no warranties proved; that the purchasers relied upon their own skill and judgment after ample opportunity for inspection and after the making of such tests as defendants required. Judgment was entered for the full amount

owing by the defendants. This appeal is from the judgment, and the matter is here for a trial *de novo*.

The first question for consideration is the effect of the failure of the plaintiff to comply with the sections of our statutes governing the transaction of business in this state by foreign corporations. The substance of the legal requirements may be stated as follows: Section 136 of the Constitution provides: "No foreign corporation shall do business in this state without having one or more places of business and an authorized agent or agents in the same, upon whom process may be served." Section 5238, Comp. Laws 1913, prohibits the transaction of any business within this state by any foreign corporation "until such corporation shall have filed in the office of the secretary of state a duly authenticated copy of its charter, articles of incorporation, and by-laws," and shall have complied with the other provisions of the chapter. Section 5240, Comp. Laws 1913, requires the filing in the office of the secretary of state of an appointment designating that officer as the attorney upon whom process may be served in any action or proceeding against it. Section 5242 provides: "Every contract made by or on behalf of any corporation, association or joint stock company, doing business in this state, without first having complied with the provisions of § 4913, if an insurance company, or with the provisions of §§ 5238 and 5240, if other than an insurance company, shall be wholly void on behalf of such corporation, association or joint stock company and its assigns, but any contract so made in violation of the provisions of this section may be enforced against such corporation, association or joint stock company."

The statute is explicit in declaring that any contract made by a corporation which has not complied with the requirements is void. It can only be given effect by refusing to treat any contract made by a noncomplying corporation as having any validity when the same is made the basis of an action in court. We are not, therefore, concerned with the status of a domestic contract entered into by a foreign corporation and a resident of the state under common-law principles or even under statutory provisions, which, though requiring some sort of license, do not expressly state the effect of the failure to secure one. 12 R. C. L. 83, 84; Beale, Foreign Corp. §§ 212, et seq.

In addition to the above provisions it seems that foreign corporations are required to file an annual statement or report with the secretary of

state, and to pay therefor a fee of \$2.50 at the peril of having their authority to transact business in the state canceled. See §§ 4518 and 4521, Comp. Laws 1913, as amended by chap. 99, Sess. Laws 1917, and chap. 4 of the Laws of the Special Session of 1918.

Did the plaintiff corporation transact business in North Dakota within the statutes referred to? The finding of the trial court, which has been previously referred to, is to the effect that it did not; the finding being that, so far as the evidence discloses, the transaction at bar constitutes the only business done in North Dakota. If this finding is correct under the evidence, it may well be that, under the interpretation adopted in prior decisions (State use of Hart-Parr Co. v. Robb-Lawrence Co. 15 N. D. 55, 106 N. W. 406; Sucker State Drill Co. v. Wirtz, 17 N. D. 313, 18 L.R.A.(N.S.) 134, 115 N. W. 844), no statute has been violated and the contract is valid. But the evidence does not, in our opinion, warrant the finding as a finding of fact. Without referring to other testimony, we may safely take that of Dahl, who appears to have been both an officer and general manager of the Dahl Implement & Lumber Company. This shows, rather, that the transaction in question was consummated in the ordinary course of business. According to his testimony, it would seem that the plaintiff made no distinction in the transaction and solicitation of its business in the territory tributary to the village of White Rock, South Dakota, based upon the existence of the state line; that wherever it appeared to Dahl to be advantageous he would solicit, and, if possible, consummate sales in North Dakota as well as in South Dakota. It is true that no other sale is proven as a matter of fact. But it is also true, and in fact not disputed, that the transaction in question resulted from the ordinary pursuit of the plaintiff's ordinary business. From the fact that no other sales were proven to have been consummated in like manner, we cannot assume that this is the only sale or the first sale (if that is important) where the record shows that the corporation was as keen to transact its business in North Dakota as in South Dakota. While it is true that the prohibition is from the doing of business, and that, as is frequently held, an isolated transaction does not amount to a doing of business, it is also true that where an ordinary pursuit of business is shown, no exception is made in favor of what may be the first transaction consummated.

As is said in *Beale on Foreign Corporations* (§ 205):

"Where, however, the foreign corporation enters upon a continuous line of business it is doing business within the state. . . ."

"It is not essential for the application of this principle that several acts of business should already have been done; if a regular business is contemplated, the corporation has begun to carry on business when it does its first business act."

The text continues, quoting from *Mason, J., in John Deere Plow Co. v. Spatz*, 69 Kan. 255, 76 Pac. 863, 2 Ann. Cas. 304, as follows: "Although the record in each case discloses but one transaction of the corporation, that transaction was not merely incidental or casual. It was a part of the very business to perform which the corporation existed. It did distinctly indicate a purpose on the part of the corporation to engage in business within the state, and to make Kansas a part of its field of operation, where a substantial part of its ordinary traffic was to be carried on. Therefore, although a single act, it constituted a doing of business in the state within the meaning of the statute, while several acts of a different nature might not have had that effect."

The foregoing is peculiarly applicable to the situation presented on this record, where it appears that the principal place of business of the plaintiff corporation was but a short distance over the state line, and that the corporation availed itself of the tributary territory in this state without regard to the state line. Under such a business practice any single transaction could not be said to be an isolated transaction within the rule applied by the trial court. The plaintiff, therefore, is not removed from the penalty of the statute because of the isolated character of the transaction in question.

In view of the plenary power delegated to Congress to regulate interstate commerce (U. S. Const. art. 1, § 8) and of the decisions of the United States Supreme Court which interpret the extent of the power thus granted, and define the implied limitations upon the powers of the states to impose conditions or restrictions upon interstate commerce, it is generally held that state statutes of the character of that under consideration in this case have no application to the interstate business of foreign corporations, or if they do purport to apply they are to that extent void. *Vicksburg, S. & P. R. Co. v. DeBow*, 148 Ga. 738, 98 S. E. 381; *Belle City Mfg. Co. v. Frizzell*, 11 Idaho, 1, 81 Pac. 58; *Coit & Co. v. . . .* 102 Mich. 324, 25 L.R.A. 819, 4 Inters. Com. Rep. 768, 60 N.

W. 690; Sucker State Drill Co. v. Wirtz, 17 N. D. 313, 18 L.R.A. (N.S.) 134, 115 N. W. 844; Toledo Commercial Co. v. Glen Mfg. Co. 55 Ohio St. 217, 45 N. E. 197; L. Miller & Co. v. Goodman, 91 Tex. 41, 40 S. W. 718; Texas & P. R. Co. v. Davis, 93 Tex. 378, 55 S. W. 562; Texas & P. R. Co. v. Davis, — Tex. Civ. App. —, 54 S. W. 381; Gale Mfg. Co. v. Finkelstein, 22 Tex. Civ. App. 241, 54 S. W. 619; Pasteur Vaccine Co. v. Burkey, 22 Tex. Civ. App. 232, 54 S. W. 804; Lane & B. Co. v. City Electric Light & Waterworks Co. 31 Tex. Civ. App. 449, 72 S. W. 425; Butler Bros. Shoe Co. v. United States Rubber Co. 84 C. C. A. 167, 156 Fed. 1; Robbins v. Taxing Dist. 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; Leisy v. Hardin, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; International Textbook Co. v. Pigg, 217 U. S. 91, 54 L. ed. 678, 27 L.R.A. (N.S.) 493, 30 Sup. Ct. Rep. 481, 18 Ann. Cas. 1103; notes in 24 L.R.A. 311, 9 L.R.A. (N.S.) 1214, and 23 L.R.A. (N.S.) 834; Beale, Foreign Corp. § 250; 12 R. C. L. 74.

Under these authorities a construction of the language of our statute prohibiting foreign corporations from transacting "any business within this state" which would make it applicable to interstate as well as intrastate business would render it void as to the former. Such statutes are, therefore, generally construed as prohibiting the transaction of intrastate business only. (See the cases cited above.) A contrary interpretation of a Kansas statute by the supreme court of that state (see *State ex rel. Shaween County v. American Book Co.* 65 Kan. 847, 69 Pac. 563; *John Deere Plow Co. v. Wyland*, 69 Kan. 255, 76 Pac. 863, 2 Ann. Cas. 304; *International Text Book Co. v. Pigg*, 76 Kan. 328, 91 Pac. 74) led to a reversal of the decision last cited (*International Textbook Co. v. Pigg*, 217 U. S. 91, 54 L. ed. 678, 27 L.R.A. (N.S.) 493, 30 Sup. Ct. Rep. 481, 18 Ann. Cas. 1103), on the ground that the statute, as thus construed, was unconstitutional.

The principle of *Paul v. Virginia*, 8 Wall. 168, 19 L. ed. 357, and analogous cases (*Bank of Augusta v. Earle*, 13 Pet. 519, 10 L. ed. 274; *Liverpool & L. Life & F. Ins. Co. v. Massachusetts (Liverpool & L. Life & F. Ins. Co. v. Oliver)* 10 Wall. 566, 19 L. ed. 1029; *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727, 28 L. ed. 1137, 5 Sup. Ct. Rep. 739; *Fire Asso. of Phila. v. New York*, 119 U. S. 110, 30 L. ed. 342, 7 Sup. Ct. Rep. 108, relied upon by the appellant, has been expressly held to be

not applicable to corporations engaged in interstate commerce. See *Crutcher v. Kentucky*, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851. See also concurring opinion of Justices Matthews and Blatchford in *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727, 28 L. ed. 1137, 5 Sup. Ct. Rep. 739. Also note *Denson v. Chattanooga Nat. Buildg. & L. Asso.* 46 C. C. A. 634, 107 Fed. 777, same case, 189 U. S. 408, 47 L. ed. 870, 23 Sup. Ct. Rep. 630.

The transaction in question in this case is not intrastate in its character, for it involves both the initial steps leading up to a sale of articles of commerce, which at the time of the sale were located in another state, and the final consummation of that sale by delivery, followed by transportation to this state. Every step in the transaction was in furtherance of interstate commerce, as that term is defined in numerous decisions of the United States Supreme Court. To visit the penalty, then, of § 5241 on the corporation conducting this transaction would be to render void a contract made in furtherance of a transaction in interstate commerce, and that without any authority of Congress. This the state is powerless to do, and we should not assume that such a consequence was intended. We therefore hold that § 5238, Comp. Laws 1913, does not prohibit a foreign corporation from carrying on a transaction or transactions in interstate commerce, such as that presented here, and that § 5241 has no application to contracts made by foreign corporations in carrying on such commerce.

It is next contended that the defendants have effected a legal rescission of the contract for fraud. The fraud relied upon as justifying the rescission consists of alleged misrepresentation and suppression of facts concerning the engine. The rig in question was a secondhand outfit that had been sold in 1913 to a farmer by the name of Snell, who lived east of White Rock, in Minnesota. He had used it some three years, and in the final settlement with the Dahl Implement Company it was turned back to the company, and had not been in use during 1916 and 1917. It is claimed that when Snell bought the engine it was sold to him as a new one, when in fact it was a built-over engine. Except for its value as a corroborative circumstance this fact is immaterial in this controversy, for the reason that the defendants did not plead that there was any misrepresentation concerning the description of the engine, when purchased by Snell, nor concerning its age.

The remaining contentions with respect to misrepresentations have to do with the condition of the engine at the time it was bought by the defendants, and with its ability to perform the work of properly running the separator. Statements of this character, if made by Dahl, would amount to warranties; and inasmuch as the defendants also set up breach of warranty, we shall consider the evidence bearing upon the alleged misrepresentations in connection with that defense.

It is claimed that the defendant represented the engine to be in A-1 condition and capable of going out in its then condition and doing the work of operating the separator; that the rig had always done good work and was capable of going out again in substantially its then present condition and doing good work.

The trial court found that the defendants E. A. Campbell and John Hoffman each had had several years of experience in running steam threshing machines, but of a different kind and make from that involved here; that all of the defendants had inspected the machinery fully before it was purchased, making all tests which they desired to make and buying the machinery in reliance upon their own judgment and ability to repair it and make it do the work for which it was bought. It was also found that the alleged warranties regarding the engine were not proven; and that under the evidence it appeared that, with reasonably competent management, the engine might be made to furnish the power required to run the separator at full capacity.

As before stated, the machinery was purchased early in July, considerable time before its use by the defendants would be required. The entire purchase price was \$1,225. The price of such a rig new would have been \$5,240. There is no dispute as to the fact that it was understood the defendants would have to make certain repairs upon the separator, such as the putting on of a new roof, etc. Neither is it disputed that they inspected the separator fully, and that, instead of the needed repairs being confined to the roof and certain minor matters, they found it necessary to put in some additional timbers to replace some that were found to have been rotted. Nor is it disputed that there was an agreement with reference to replacing the broken drive wheels on the engine, the plaintiff agreeing to furnish wheels which had already been obtained for that purpose and put them on for \$25. (This latter amount was added to the original consideration of \$1,200.) The evidence further

shows beyond question that the defendants, at least two of whom had had considerable experience in operating threshing machines, not only had full opportunity to inspect the rig, but that they made several trips to White Rock for the purpose of satisfying themselves as to its condition. When they indicated a doubt as to whether the engine would stand the necessary steam pressure, either they or Dahl suggested that it be tested. They went to White Rock for that purpose, but by reason of defective packing about the hand holds of the boiler the test had to be abandoned that day, but a cold-water pressure test was made the following day in their presence by one Hawkinson, a boiler inspector of the state of Minnesota. It appears that the engine had not been used a great deal after the putting in of new flues, and that it stood the pressure test sufficiently to satisfy the purchasers. The engine was the type known as Minneapolis 27 H. P. Compound engine, which was no longer manufactured by the company that made it, and it appears that before the defendants put it in operation it had not been used for two seasons prior, and that they did not reset the valves, inspect the piston rings and packing for leakages or take any other steps to see that its mechanism was in working order. They complain that while they could get up steam pressure which should have been sufficient to furnish the requisite power to pull the separator, the engine would foam, lose power, and dissipate the steam pressure without delivering the necessary power at the pulley, thus necessitating frequent stops for the purpose of getting up more pressure, or running the separator at less than capacity, or weakening its efficiency as a threshing instrumentality by taking out concaves to make it pull easier.

The defendants testify in substance that Dahl told them that the engine was in A-1 condition and capable of going right out and doing good work; whereas Dahl denies that he made any such statements. He testifies that, on account of closing out his business and the difficulty of obtaining skilled mechanical labor, he could not do the necessary work to put the rig in condition; that he therefore desired to dispose of it, as it was early in the season, so that the purchasers could have ample time in which to put it in repair themselves. For these reasons, which he says he communicated to the defendants, he would and did sell the rig to them at such time and at such a price as to enable them to assume

responsibility for needed repairs, except to the extent of parts that he expressly agreed to supply.

It will be seen, from the foregoing statement, that there is a sharp conflict in the testimony relating to the warranty, and that the greater weight of the evidence, considered from the standpoint of the number of witnesses, is with the defendants, although it must be conceded that some of the circumstances tend to support the version of Dahl. The majority of the members of this court, upon a careful reading of the record, have come to the conclusion that the defendants have established by the greater weight of evidence the warranty claimed.

For breach of this warranty, the defendants are entitled to recover their damages. The trial court has made a finding on this subject which appears to us reasonable and to be well supported by the evidence. The finding is that the defendant expended time in repairing the machinery and in attempting to operate it, that was reasonably worth \$300; and that, if the defendants are entitled as a matter of law to recover on their counterclaim, they should recover that amount. Being of the opinion that this counterclaim is established, the judgment of the court below should be modified by allowing the defendants credit on the note for \$300, leaving judgment to be rendered in the plaintiff's favor for \$925 and interest as prescribed. With this modification, the judgment of the court below is affirmed. The appellants are entitled to their costs upon this appeal.

CHRISTIANSON, Ch. J., and BRONSON and ROBINSON, JJ., concur.

GRACE, J. (concurring in part and dissenting in part). The majority opinion has construed § 136 of the Constitution, and §§ 5238, 5240, and 5242, Comp. Laws 1913.

It, in effect, holds that such constitutional provision and all of said statutes are invalid.

We think, however, the part of the opinion which discusses § 136 of the Constitution, and said statutes, is largely obiter dictum, for it is clear from the evidence in the case, that plaintiff was not doing business in the state of North Dakota. It was a foreign corporation; its principal place of business was White Rock, South Dakota. The transaction in question—that is, the selling of this threshing outfit to the defend-

ants—was the only one had in this state, and it was only partially had in this state, a large share of the transaction having taken place in South Dakota.

It therefore is clear from the record, the plaintiff was not doing business in North Dakota, for the doing of business does not exist as a fact, by the doing of a single, isolated transaction, and in this case even that is at least partially lacking.

The conclusion is irresistible that the plaintiff's corporation was not transacting business in North Dakota, within the meaning of the statutes and the constitutional provision referred to, the plaintiff having carried on only a part of an isolated transaction within this state.

See, *State use of Hart-Parr Co. v. Robb-Lawrence Co.* 15 N. D. 55, 106 N. W. 406; *Sucker State Drill Co. Wirtz*, 17 N. D. 313, 18 L.R.A. (N.S.) 134, 115 N. W. 844.

As we view the matter, the opinion of the court, in this regard, is based upon an assumed state of facts. In other words, there are no facts in the record to which the reasoning therein can apply. In other words, the plaintiff was not doing business in the state of North Dakota. Hence, the question under consideration, discussed by the opinion of the court, does not inhere in this case.

The evidence clearly shows that the plaintiff warranted the threshing rig as a whole. Several witnesses for the defendants, by clear and convincing evidence, established this fact. It is also manifest that such guaranty related not only to the condition of the threshing rig, to its state of preservation, excepting as to the roof of the separator, and certain wheels for the engine, but it also included its capacity to do the work which threshing rigs of similar size and capacity are intended to do. It also conclusively appears from the evidence, that the threshing rig was absolutely worthless as such; that, in fact, it would do no work. The engine had no power; the separator had not only a rotted roof, but the remainder of the woodwork was largely decayed, especially in the mortises.

The judgment should be reversed, and a new trial granted.

The real issue to be determined upon a new trial should be the difference in value between the threshing rig, as represented and warranted, and its actual value in its condition before any repairs were made by the defendants.

The defendants should, also, be permitted to recover the amount of money which they expended in repairing of said machine, with the exception of the amount expended in repairing the roof of the separator. They should, also, be permitted to recover any damages sustained by them, which are the proximate result of plaintiff's misrepresentations, upon which they relied, if it further be shown, that plaintiff knew, at the time it sold said threshing rig, and made said representations and warranties, that the defendants were depending upon the use of said threshing rig to thresh their crops, and they were damaged by not being able to use it for that purpose.

CHARLES SIMON, Respondent, v. CHICAGO, MILWAUKEE, &
ST. PAUL RAILWAY COMPANY, a Corporation, Appellant.

(177 N. W. 107.)

Attorney and client — contract for contingent fee for services.

1. Where an attorney, having made a contract for a contingent fee in a personal injury action, has been dismissed by his client, who has thereafter employed other attorneys to prosecute the action, and where such action is finally settled, and moneys retained by the defendant therein, to cover the amount of the first attorney's lien claimed, with the knowledge and without the objection of such attorney, it is *held*, upon an action by such attorney to recover payment for his lien, that the amount of recovery must be based upon the reasonable value of the services performed or the actual damages sustained by breach of the contract.

Attorney and client — stipulation that client cannot settle without attorneys' consent held void.

2. Where in such action, by the first attorney, it appears that the second

NOTE.—That the great weight of authority holds that where an attorney is employed on a contingent fee consisting of a percentage of the amount recovered, and the client compromises the case, the amount for which the case is settled is the basis on which the attorney's percentage is to be computed, will be found by an examination of the cases in a note in 3 A.L.R. 472, on amount or basis of recovery by attorney who takes case on contingent fee, where client discontinues, settles, or compromises.

On validity of provision, in contract for contingent fee, forbidding client to settle claim without attorney's consent, see note in 14 L.R.A. (N.S.) 1101.

attorneys employed are interested, by reason of their contingent contract, in the amount retained, and, further, that their contract contains the stipulation that no settlement shall be made by their client without their consent, it is held that such contract provision is void as against public policy, and their interest, if any, in the fund involved, must be determined by the reasonable value of their services rendered, if not fully theretofore paid.

Attorney and client — client properly a party to dispute between his attorney and defendant for fees.

3. In such action, it is further held that the former client of such attorneys is properly a party interested, and is entitled to receive any moneys remaining after the payment of the amount justly due his attorneys.

Opinion filed March 1, 1920. Rehearing denied March 26, 1920.

Proceedings in District Court, Stark County, *Nuessle, J.*, upon an attorney's lien.

From a judgment in favor of the plaintiff, the defendant has appealed.

Reversed and remanded with directions.

E. L. Granthem and Jacobson & Murray, for appellant.

"This right of discharge exists even though a contingent fee has been agreed upon, or an irrevocable power of attorney has been given, or the attorney has rendered valuable services under his employment, or the client is indebted to him therefor, or for moneys advanced in the prosecution or defense of the action." 6 C. J. 676, §§ 193, 677, 678; *Schouweiller v. Allen*, 17 N. D. 510; *Gage v. Atwater*, 136 Cal. 170, 68 Pac. 581; *Price v. Western Loan, etc., Co.* 35 Utah, 379, 100 Pac. 677; *Henry v. Vance*, 111 Ky. 72, 81, 63 S. W. 273; *Crosby v. Hatch*, 155 Iowa, 312, 316, 135 N. W. 1079.

Where the complete performance of an attorney's services has been rendered impossible, or otherwise prevented, by the act of his client, the attorney may, as a general rule, recover on a quantum meruit for the services actually rendered, or he may have an action for damages.

6 C. J. pp. 724, 725, §§ 292, 293; *Such v. New York State Bank*, 121 Fed. 202; *Union Surety Co. v. Tenney*, 102 Ill. App. 95, 65 N. E. 688; *French v. Cunningham*, 149 Ind. 632, 49 N. E. 797; *Henry v. Vance*, 111 Ky. 72, 63 S. W. 273; *Philbrook v. Moxey*, 191 Mass. 33, 77 N. E. 520; *Cosgrove v. Burton*, 104 Mo. App. 698, 78 S. W. 667;

Foley v. Klienschmidt, 28 Mont. 198, 72 Pac. 432; Harris v. Root, 28 Mont. 259, 72 Pac. 429; Haire v. Hughes, 127 App. Div. 530, 111 N. Y. Supp. 892, 90 N. E. 1159; Whitesell v. New Jersey R. Co. 68 App. Div. 82, 74 N. Y. Supp. 217; O'Niell v. Crane, 65 App. Div. 358, 72 N. Y. Supp. 812; Bryant v. Brooklyn Heights R. Co. 64 App. Div. 542, 72 N. Y. Supp. 308; Naumer v. Gray, 41 App. Div. 361, 58 N. Y. Supp. 476; Seasongood v. Prager, 70 Misc. 490, 127 N. Y. Supp. 482; Yuells v. Hyman, 84 N. Y. Supp. 460; Rogers v. O'Mary, 95 Tenn. 514, 32 S. W. 462; Southern Nat. Bank v. Curtis (Tex. Civ. App.) 36 S. W. 911; Sheridan County v. Hanna, 9 Wyo. 368, 63 Pac. 1054; Riehl v. Levy, 45 Misc. 425, 90 N. Y. Supp. 411; Schmitt v. Curtiss, 72 Wash. 211, 130 Pac. 89.

"The lien of an attorney entitled him to recover for his own personal services only, and not for the services of another employed by him to assist." 6 C. J. p. 770, § 368, p. 771; Weaver v. Cooper, 73 Ala. 318; Kauffman v. Phillip, 154 Iowa, 542, 134 N. W. 575; Gibson v. Chicago R. Co. 122 Iowa, 565, 98 N. W. 474; Lynn v. Agnew (N. Y.) 166 N. Y. Supp. 274; Martin v. Camp, 219 N. Y. 170, 114 N. E. 46; DeAngelis v. Savings Bank, 132 N. Y. Supp. 295; Corcoran v. Kellogg Struct. Co. 166 N. Y. Supp. 269.

A solicitation of a case or promise of payment of money for the case by an attorney defeats his right to an attorney's lien. Holloway v. Dickenson (Minn.) 163 N. W. 791; Holland v. Sheehan (Minn.) 123 N. W. 1; Ellis v. Frawley (Wis.) 161 N. W. 364; Anker v. C. G. W. R. Co. (Minn.) 167 N. W. 278.

This kind of an action is an action at law. Sweeley v. Sieman (Iowa) 98 N. W. 571; Barthell v. C. M. & St. P. R. Co. 116 N. W. 813.

W. F. Burnett, for respondent.

"A suitor has the right to discharge his attorney, either with or without reason, at any time during the progress of the litigation which he was employed to conduct, provided his compensation is paid or secured." Dorsheimer v. Herndon (Neb.) 153 N. W. 497; Detroit v. Whittemore, 27 Mich. 281; Moyer v. Cantiney, 41 Minn. 242, 42 N. W. 1060; Sessions v. Warwick (Wash.) 89 Pac. 482.

"According to the weight of authority, the measure of damages for such breach of contract is the full contract price, especially when the

attorney's work is substantially done, unless some other sum has been agreed upon." 6 C. J. 724; *Kersey v. Garton*, 77 Mo. 645.

"The fact that the settlement was finally made by another attorney does not affect the plaintiff's right to recover." *Scheinsohn v. Lemonek*, 84 Ohio St. 424, Ann. Cas. 1912C, 737; *McGowan v. Parish*, 285 U. S. 300, 59 L. ed. 955; *Larned v. Dubuque* (Iowa) 53 N. W. 105; *Countryman v. California Trona Co.* (Cal.) 170 Pac. 1072; *Re Carney*, 158 N. Y. Supp. 585; Comp. Laws 1913, § 6875; *Greenleaf v. Soo*, 30 N. D. 112; *Greenleaf v. Mpls. St. P. & St. Ste. M. R. Co.* 30 N. D. 112; *O'Connor v. St. Louis Transit Co.* 198 Mo. 622, 115 Am. St. Rep. 495, 8 Ann. Cas. 703; *Grand Rapids & I. R. Co. v. Cheboygan Circuit Judge* (Mich.) 126 N. W. 56; *Zentmire v. Brailey* (Neb.) 130 N. W. 1047; *Lewis v. Omaha St. R. Co.* (Neb.) 114 N. W. 281; 2 R. C. L. § 171, p. 1080; *Cheshire v. Des Moines City R. Co.* 153 Iowa, 188, 133 N. W. 324.

"It is only by virtue of statutory provisions that a court of law has jurisdiction to enforce an attorney's lien, and, in the absence of such statutes, the proper method for enforcing such lien is by resort to equity." 2 R. C. L. 1085; *Fillmore v. Wells*, 10 Colo. 228, 3 Am. St. Rep. 567, 15 Pac. 343; *Alexander v. Monroe*, 54 Or. 500, 135 Am. St. Rep. 1040, 101 Pac. 903, 103 Pac. 514.

The rights of the attorney, under his lien, are those of an equitable assignee. *Warfield v. Campbell*, 38 Ala. 534; *Ely v. Cooke*, 28 N. Y. 365; *Perry v. Chester*, 53 N. Y. 240; *Marshall v. Meech*, 51 N. Y. 140; *Rooney v. Railroad Co.* 18 N. Y. 368.

Where notice of a lien is given, and before trial and judgment the parties settle the case and the suit is dismissed, the attorney may maintain a separate action to recover the amount due upon his lien, and in such action the client is not a necessary party. *Story*, Eq. Pl. ¶ 211; *Barber, Parties*, 456; *Bell v. Lake County*, 141 Pac. 861; *Louisville & N. R. Co. v. Procter* (Ky.) 51 S. W. 561; *Yonge v. St. Louis Transit Co.* (Mo.) 84 S. W. 184; 4 Cyc. 1017; *Davidson v. Board of Comm.* (Colo.) 59 Pac. 46.

An attorney's lien may be foreclosed in an equitable action whether it is an attorney's lien at statute or common law. *Fillmore v. Wells* (Colo.) 3 Am. St. Rep. 574; *Parsons v. Hawley* (Iowa) 60 N. W. 520;

Wetherby v. Weaver (Minn.) 52 N. W. 970; 6 C. J. p. 802, ¶ 422; 4 Cyc. 1020, 1022; Taylor v. St. Louis Transit Co. 198 Mo. 715.

BRONSON, J. This is a proceeding upon an attorney's lien. On November, 16, 1916, the plaintiff, an attorney, made a contract with one Franz, to prosecute an action against the defendant for injuries received by Franz upon a contingent-fee basis. The contract provided for a fee of 25 per cent contingent upon the amount recovered in suit or settlement, after deducting certain costs and expenses.

Pursuant thereto, on November 23, 1916, such attorney instituted an action against the defendant in behalf of Franz, and served notice of his attorney's lien. This action was thereafter removed by the defendant to the Federal court. Subsequently, Franz made another contract with Jacobson & Murray, attorneys at law, for the prosecution of the same action. This contract provided for a contingent fee of $33\frac{1}{3}$ per cent of the amount to be recovered in suit or settlement, and further provided that no settlement should be made by Franz without the consent of his attorneys. Such attorneys thereupon prepared a formal dismissal of the action already instituted in behalf of Franz; the same was signed by Franz and forwarded to the clerk of the Federal court. Thereupon another action was commenced in the Federal court, against the defendant, upon the same cause of action.

In May, 1919, the subject-matter came up for the consideration of the Federal court, both actions appearing upon the calendar. Upon proceedings had in the Federal court, the action was dismissed on an order entered by the court that the amount of the contingent fee, provided for the plaintiff herein, be retained by the defendant pending the further order of the court. Thereupon, the second action was settled for the sum of \$11,000, subject to the provision that the defendant should protect itself by retaining sufficient funds or by means of indemnification against the lien of the plaintiff herein. Settlement was made by payment of the money through the First National Bank of Mott, apparently upon an express understanding, or through an undertaking of indemnity, for the retention of sufficient moneys to protect the defendant upon plaintiff's lien.

This action was instituted to recover the amount of such lien, to wit, \$2,750, from the defendant.

In the trial court the action was tried to the court, a jury trial being refused, and, pursuant thereto, upon findings of the court, judgment was entered in favor of the plaintiff for \$2,750, with interest and costs. This appeal is from the judgment rendered, and a demand is incorporated for a review of the entire case.

Plaintiff's action is founded upon a lien accorded by statute. Comp. Laws 1913, § 6875. To enforce this lien necessarily he must seek to foreclose it as provided by statute Comp. Laws 1913, § 6878. This court has jurisdiction over the enforcement of this lien and the parties. *Scharmann v. Union P. R. Co.* 144 Minn. 290, 175 N. W. 554.

Franz had the undoubted right to discharge the plaintiff as his attorney, either with or without reason. *Schouweiler v. Allen*, 17 N. D. 510, 516, 117 N. W. 866. He had the further undoubted right to settle, or compromise the action involved, without the consent of the plaintiff. *Paulson v. Lyson*, 12 N. D. 354, 97 N. W. 533, 1 Ann. Cas. 245; *Southworth v. Rosendahl*, 133 Minn. 447, 3 A.L.R. 468, 158 N. W. 717. Accordingly, after the dismissal of the plaintiff as an attorney, his contract for services was both executory and incapable of performance. Specific performance was arrested by the action of Franz in dismissing him. The question presented now is whether the plaintiff is entitled to recover in accordance with his contract, the full measure agreed, the same as if the services had been performed by him, or whether as an attorney he should recover either his damages for breach of the contract, or, in disregard of the contract, the reasonable value of his services. In this case, the plaintiff is not subject alone to principles of equitable consideration, but to conscionable dealing as an officer of this court. In equity, and as an officer of this court, his contract fairly and justly made with his client for the enforcement of his client's rights should undoubtedly be upheld and enforced for services justly rendered and performed for his client. But in the relation of attorney and client, there exists besides, other considerations, the duty of an attorney, as an officer of this court, to so act in the just expedition of his former client's cause, without seeking any sum due or unconscionable advantage by reason of his retainer based alone upon the plain absolute terms of the contract. A client who has the right of dismissing an attorney has the right to employ another. Thus, it might well happen that, in contingent-fee contracts, the entire amount of the client's cause of action might be stip-

ulated away before the attorney, finally employed, might render, in fact, the *services* stipulated to be rendered for the cause of action involved. Upon this record, the client's cause was finally settled and one cause of action dismissed, both with his knowledge and without his objection, for the reason that provision was made for the retaining of funds sufficient to compensate his employment.

In such event the plaintiff, as an attorney, is entitled to receive payment for services rendered in behalf of his client, measured either by *quantum meruit*, or by damages actually sustained through breach of the contract. See *Southworth v. Rosendahl*, *supra*.

It appears, necessarily, that the attorneys Jacobson & Murray, by reason of their contract, are interested in the fund or moneys retained by the defendant in the settlement made. Franz necessarily is interested in such amount, for whatever is not justly due his attorneys belongs to him. The contract of Franz's second attorneys, which contained the stipulation prohibiting a settlement without the consent of his attorneys, was invalid as against public policy, and limited such attorneys, in the event of a suit, to recovery based upon the reasonable value of the services rendered by them. *Moran v. Simpson*, 42 N. D. 575, 173 N. W. 769. See *Southworth v. Rosendahl*, *supra*; note in 3 A.L.R. 472.

Therefore, it follows that, in any event, the amount, if any, out of such fund to be paid to Jacobson & Murray, is only that which might be due them for the balance of the reasonable value of their services rendered, if heretofore or otherwise they have not been so fully compensated. It therefore follows, in accordance with the view expressed herein, that the judgment should be reversed and the case remanded for further proceedings in the District Court consonant with this opinion with specific directions to the trial court to cause the second attorneys, Jacobson & Murray, and the former client, Franz, to be made parties to this proceeding for the purposes of determining their respective interest in the moneys involved and retained. It is so ordered. No costs will be allowed either party on this appeal.

GRACE, J., concurs.

ROBINSON, J. I concur in result.

BIRDZELL, J. I dissent.

45 N. D.—17.

ROBINSON, J. This is an appeal from a judgment against defendant for \$2,750 and interest. The case was tried before the court without a jury, and appellant demands a new trial. The complaint is based on the statute in regard to attorneys' liens. The complaint avers that in 1916 at Regent, North Dakota, through the negligence of the defendant, one John P. Franz was run over by a car of defendant, which cut off one foot and destroyed both feet and made him a cripple for life; that as attorney at law, the plaintiff, was retained by Franz to commence an action to recover from defendant \$50,000 for the injury; and that, in writing, Franz promised to pay the plaintiff 25 per cent of the sum recovered; that plaintiff commenced the action and served on defendant notice of his contract and his claim for a lien of \$12,500; that afterward defendant paid Franz \$11,000 in full settlement of the claim for damages.

While the action was pending, attorney Murray, rather unprofessionally, dictated and caused Franz to sign and mail to plaintiff rather insulting letters forbidding him to prosecute the action; that, pursuant to an agreement signed by Franz, Murray commenced a second action in the United States district court, and there met the censure of Judge Amidon, when he moved to dismiss the first action.

However, on assurance that Mr. Simon, the plaintiff in this action, should be paid his fees, the matter was arranged, and the first action dismissed by order of Judge Amidon.

The defendant settled the case by paying Franz, or his attorneys, \$11,000. As it seems, the railway company refused to settle until Mr. Murray deposited in the bank the sum sufficient to indemnify the company against the claim of Simon. The deposit was made and the bank signed a bond to indemnify and save harmless the railway company. And so it appears that Mr. Murray, or Jacobson & Murray are the real party defendants in this action.

The total amount of attorney fees should not have exceeded \$1,000. The case is very simple, and the attorneys did little suffering and little work.

However, some four years ago, in a personal injury suit, a majority of this court erroneously held that in personal injury suits the statutes gives a lien for attorney fees. Greenleaf Case, 30 N. D. 115, 151 N. W. 879, Ann. Cas. 1917D, 908. Here is the statute, § 6875: "An attorney has a lien for . . . money due his client in the hands of the ad-

verse party, or attorney of such party, in an action or proceeding in which the attorney claiming the lien was employed from the time of giving notice in writing to such adverse party or the attorney . . . [of the lien claimed]; . . . which notice shall state the amount claimed and in general terms for what services."

Now the principle of law is this: A cause of action for a breach of promise to marry, an assault and battery, a libel, or personal injury, cannot be transferred or mortgaged; it is not assignable; it is not a debt, and when a person cannot transfer or mortgage the subject of an action he cannot subject it to a lien. The statute gives the attorneys a lien for *money due* in the hands of the adverse party. Now the rule of common-law pleading is that when *money is due* the law implies a promise to pay it, and it may be recovered in an action of assumpsit; but surely in cases of assault and battery, libel, false imprisonment, personal injury, and such like, the law does not imply a promise to pay. An assault or personal injury does not *create a debt*, although it may give a cause of action for damages. To give such a lien would be contrary to the statute and the policy of the law, and that is well exemplified in this case. In this simple action for a personal injury, the attorney drafted a summons and complaint and caused them to be served on the defendant, and at the same time asserted a lien on the claim for \$12,500, thus barring his client from a legal right to make a settlement. He had neither a legal nor moral right to claim such a lien.

The statute permits an attorney to make a reasonable and fair contract in regard to his fees, but it does not permit him to take an unfair advantage of the necessities and distress of his client. At the time when the contingent contract was drawn the injured party was in no position to bargain with his attorneys, and, as we have said, the suit was very simple; the attorneys sustained no injuries; they did little work and should not be permitted to charge an exorbitant price. In so simple a case 10 per cent for collection is commonly a fair fee. In the contest between the attorneys and the injured party the court should see that the rights of the latter are fully protected and guarded, even against any unfair compromise.

CHRISTIANSON, Ch. J. (dissenting). I dissent. In my opinion the record in this case affirmatively shows that the Federal court of this dis-

strict first obtained, and has never relinquished, jurisdiction over the controversy before us; and hence, under familiar principles applicable to such situations, that court should be permitted "to determine the controversy, and to fully perform and exhaust its jurisdiction, and to decide every issue or question properly arising in the case," and dispose of all "proceedings which are ancillary or incidental" thereto. 15 C. J. 1161, 1162.

In order to properly present my views, I find it necessary to first make some reference to the facts in the case.

On October 30, 1916, one John B. Franz was injured by the defendant railway company at Regent, North Dakota. On November 16, 1916, he entered into a written contract with the plaintiff, Simon, who is an attorney at law, duly licensed to practice in this state, whereby Simon was retained as Franz's attorney and agreed to prosecute an action against the railway company for such injury on a contingent-fee basis. The contract provided, in substance, that said Simon would prosecute said action to its final determination in consideration of 25 per cent of the total amount recovered in said action, or the total amount of settlement made, if settlement was made before the final determination of said action in court; and that said Franz would give to said Simon 25 per cent of the amount recovered either in the final determination of the action in court or final settlement with the railroad company, after the costs and expenses of the court proceedings in said action had been deducted from the amount recovered or the amount of settlement obtained. Thereafter on November 23, 1916, the plaintiff commenced an action against the railway company for \$50,000 damages, and served notice of an attorney's lien for 25 per cent of the amount demanded in the complaint, to wit, for the sum of \$12,500. The action was thereafter removed by the defendant railway company to the United States district court.

Subsequently another action was commenced by Franz against the defendant railway company upon the same cause of action. The second action was commenced in the United States district court of this district. The attorneys representing Franz in the second action were Jacobson & Murray. Before commencing such action Jacobson & Murray prepared a formal dismissal of the action which the plaintiff had instituted for Franz, caused such stipulation to be executed by Franz, and forwarded

it to the clerk of the United States district court. It appears that the United States district court refused to recognize the stipulation of dismissal, and required that notice be given to Simon of the application to dismiss the action. The result was that both actions appeared upon the calendar of the United States district court which convened at Bismarck in May, 1917. At that time the application for dismissal of the action instituted by the plaintiff, as attorney for Franz, was heard, with the result that on May 18, 1917, the court entered an order to the effect that such action be dismissed upon the condition that 25 per cent of the amount agreed upon to be paid to Franz in settlement of his claim for damages in said suit be retained by the defendant railway company "pending the further order of said court, upon the claim of Charles Simon for legal services rendered the plaintiff upon said claim for damages, determining the amount due said Charles Simon under his contract with Franz." It appears that on the same day a written stipulation was filed in the second action. Such stipulation was dated May 17, 1917. It provided that the action should be dismissed upon the payment by the railway company of the sum of \$11,000, subject to the condition that the defendant railway company should protect itself by the retention of sufficient funds, or that it might be indemnified by the plaintiff against all claim of Charles Simon on account of lien or claim for which said railway company might become liable to said Charles Simon. Thereafter the railway company paid the amount provided for in the stipulation, viz., \$11,000. Apparently the money was paid through the First National Bank of Mott, and with the understanding that such bank should retain a sufficient amount to cover the claim of the plaintiff. There was introduced in evidence an undertaking executed by the First National Bank of Mott and one Trousdale and Mueller in favor of the defendant railway company. The undertaking recites the facts relative to the two actions having been brought upon the same cause of action; that the action instituted by the plaintiff as Franz's attorney was dismissed by the Federal court, "subject to the claim of lien by the said Charles Simon upon any funds recovered or paid by the said railroad company in settlement and satisfaction of said claim of John B. Franz," and that Franz and his attorneys intend to contest the claim and lien of said Simon. The undertaking further provides that "for and in consideration of the payment to the said John B. Franz of the said sum

of eleven thousand dollars (\$11,000) and a deposit of a sufficient portion thereof in the First National Bank of Mott, North Dakota," receipt of which is acknowledged, the said First National Bank of Mott, Trousdale and Mueller do undertake and agree to defend all actions or proceedings brought by Simon, or on his behalf, and to pay any and all sums required to be paid to him on account of his said claim.

The plaintiff brought this action to recover from the defendant an amount equal to that which the Federal court had required that the defendant should retain "pending the further order" of that court. The action was tried to the court without a jury, and resulted in findings and conclusions in favor of the plaintiff, and defendant appealed from the judgment and demanded a trial anew in this court.

It is undisputed that there was a written contract between the plaintiff and Franz. The contract expressly provided that a certain percentage of the amount recovered by Franz, either by judgment or upon settlement, should be paid to Simon. The plaintiff, as Franz's attorney, commenced an action in accordance with the terms of that contract. It is true Franz had the right to discharge the plaintiff. He also had the right to compromise and settle the action without Simon's consent. But he could not, by either method, abrogate the contract or defeat any lien which Simon had acquired. In *Moran v. Simpson*, 42 N. D. 575, 173 N. W. 772, this court (in disposing of the contention that when the attorney and client have once agreed upon the amount of compensation it cannot subsequently be increased), said: "Whatever may be the rule in other states, we are satisfied that this rule does not apply in this state. We have a statute which treats of the right and power of an attorney in making a contract. It is § 7789, Compiled Laws 1913, which, so far as material to this case, reads thus: 'The amount of fees of attorneys, solicitors, and counsel in civil and criminal actions must be left to the agreement, express or implied, of the parties.' The language of this statute is plain and cannot be misunderstood. It confers upon the attorney the right to make a contract with his client upon such terms as he and the client may finally agree."

In *Schouweiler v. Allen*, 17 N. D. 510, 516, 117 S. W. 866, this court said: "A suitor has the right to discharge his attorney, either with or without reason, at any time during the progress of the litigation which he was employed to conduct, *provided his compensation is*

paid or secured." In *Greenleaf v. Minneapolis, St. P. & S. Ste. M. R. Co.* 30 N. D. 112, 151 N. W. 879, Ann. Cas. 1917D, 908, this court held that the attorney's lien given by § 6875, Comp. Laws 1913, "when sought to be asserted in an action or proceeding for the recovery of damages for personal injuries, attaches to that into which the right of action is merged. If a judgment is recovered the lien attaches to it; if a compromise agreement is made the lien attaches to it; and in either case the attorney's lien is such that it cannot be defeated or satisfied by a voluntary payment to his client without his consent," in a case where due notice of the lien has been given to the defendant.

Ruling Case Law says: "An attorney's lien is enforceable through the control the courts have of their judgments and records, and by means of their own process. If an attorney applies to the court to protect his lien, the court will prevent money from being paid over until his demand is satisfied; and if the judgment debtor pays a judgment to the judgment creditors, after notice of the lien, the court may require him to pay it again to the attorney. This is a power which the court exercises toward its officers and suitors within its jurisdiction." 2 R. C. L. p. 1083.

"In a number of states it has been held, either by virtue of express statutory authority, or in the exercise of the inherent power of courts to protect their officers, that an attorney whose lien has attached may apply to the court for relief against any disposition of the litigation or judgment thereon by the parties, which may affect his rights." 2 R. C. L. p. 1083.

Thornton in his work on Attorneys says: "An attorney's right to a lien for services rendered cannot be defeated by substitution. It is not doubted, of course, that the client may discharge his attorney at pleasure, and substitute another in his stead; but, in allowing such substitution, it is customary to impose terms whereby the original attorney is protected in his compensation." Thornton, Attys. at Law, § 647. It has also been held that "the court may require the payment of an attorney's lien as a condition of the discontinuance or dismissal of the cause, or the entry of a judgment for a stipulated amount where the parties have compromised." Thornton, Attys. at Law, § 667; *National Exhibition Co. v. Crane*, 167 N. Y. 505, 60 N. E. 768; *Illinois C. R. Co. v. Wells*, 104 Tenn. 706, 59 S. W. 1041.

It will be noted that when it was attempted to dismiss the action which the plaintiff had commenced for Franz, that the Federal court refused to allow it to be done *ex parte* upon the filing of the stipulation of dismissal, and ordered a hearing of the matter. At the hearing Simon appeared in person, the defendant railway company appeared by counsel, and Jacobson & Murray appeared as attorneys for Franz. Hence, all parties interested were present or represented at the hearing.

It seems clear that the real purpose sought to be accomplished by the dismissal of the first action was to obtain a substitution of attorneys in the litigation. And it would seem that the authorities cited above fully justified the Federal court in imposing the conditions which it did in allowing a dismissal of the first action. But even conceding that the order was erroneous, clearly it was not void. The Federal court had jurisdiction of the subject-matter and the parties. The order which it made was not assailed. On the contrary, the parties all acquiesced in and abided by its terms.

The record shows that upon the hearing the Federal court went into the matter quite fully. It considered not only the records and documentary evidence submitted, but interrogated at some length in regard to the facts connected with the preparation of the stipulation of dismissal. At the conclusion of the hearing the Federal court refused to allow the first action to be dismissed, except on the condition that the railway company retain out of the proceeds of the settlement, the amount which the contract between Simon and Franz entitled Simon to receive upon a settlement of the cause of action involved therein. And in the order of dismissal the court provided that the defendant must retain such amount "pending the further order of this court upon the claim of Charles Simon, . . . determining the amount due said Charles Simon under his contract with Franz." It seems to me that the only reasonable interpretation which can be placed upon this language is that the Federal court intended to, and did, reserve to itself jurisdiction and control of the moneys involved in this controversy and over the controversy itself. It specifically required the defendant to retain the amount involved in this litigation, pending the further order of that court upon the claim of Charles Simon, determining the amount due him under his contract with Franz.

There was no occasion for the Federal court to enter the order if it

merely intended to give Simon the right to institute an action against the defendant in some other court to enforce his lien. Under the express holding of this court in *Greenleaf v. Minneapolis*, St. P. & S. Ste. M. R. Co. 30 N. D. 112, 151 N. W. 879, Ann. Cas. 1917D, 908, he had such right even though the action was dismissed, settlement made, and the full amount thereof paid over to the client. He would have had such right even though the recovery was eventually secured in a second action brought by other attorneys. *Gibson v. Chicago, M. & St. P. R. Co.* 122 Iowa, 565, 98 N. W. 474. Obviously the Federal court had some object in view in making the order which it did. It, in effect, set aside a certain fund, and provided that the disposition of that fund should be subject to the further order of that court.

Under these circumstances it seems to me that the questions presented in this case ought to have been presented to, and determined by, the Federal court, or at least that that court ought to have been afforded an opportunity to determine it. For "it is a familiar principle that, when a court of competent jurisdiction acquires jurisdiction of the subject-matter of a case, its authority continues, subject only to the appellate authority, until the matter is finally and completely disposed of; and no court of co-ordinate authority is at liberty to interfere with its action." 7 R. C. L. p. 1067. See also 4 Enc. U. S. Sup. Ct. Rep. 1170; *Rock Island Plow Co. v. Western Implement Co.* 21 N. D. 608, 132 N. W. 351. This rule has been declared to be of especial importance in its application to Federal and state courts. *Farmers Loan & T. Co. v. Lake Street Elev. R. Co.* 177 U. S. 51, 61, 44 L. ed. 667, 671, 20 Sup. Ct. Rep. 564. See also, *People ex rel. American Surety Co. v. Benham*, 71 Misc. 345, 128 N. Y. Supp. 610.

Corpus Juris says: "Where a state and a Federal court have concurrent jurisdiction over the same parties or privies and the same subject-matter, the tribunal where jurisdiction first attaches retains it exclusively, and will be left to determine the controversy, and to fully perform and exhaust its jurisdiction, and to decide every issue or question properly arising in the case. This jurisdiction continues until the judgment rendered in the first action is satisfied, and extends to proceedings which are ancillary or incidental to the action first brought. Accordingly, where the jurisdiction of a state or Federal court has once attached, it cannot be taken away or arrested by proceedings subse-

quently instituted in the other court; but the usual practice is for the court in which the second action is brought not to dismiss such action, but to suspend proceedings therein until the first action is tried and determined." 15 C. J. 1161-1163.

There is nothing said in *Scharmann v. Union P. R. Co.* 144 Minn. 290, 175 N. W. 554 (cited in the majority opinion), which affects the rule stated, or precludes the application thereof in this case. The *Scharmann* Case did not deal with questions of comunity or conflict of jurisdiction between courts of co-ordinate or concurrent authority. That case was decided on the ground that a certain judgment rendered by a Nebraska court was a nullity for the reason that the court had no jurisdiction over either the person against whom the judgment was rendered, or the res concerning which the judgment purported to adjudicate.

In that case, *Scharmann*, a locomotive engineer in the employ of the Union Pacific Railway Company in the state of Nebraska, sustained certain injuries. He employed an attorney named Stiles, of Minneapolis, to bring suit against the company, agreeing to allow him for his services one third of the amount recovered either by suit or settlement. Suit was brought in the district court of Hennepin county. In the summer of 1917, *Scharmann* entered into an agreement with the railway company, "settling the case for \$10,000, and dismissing it without the knowledge of plaintiff's attorney, or the payment of his fees." Thereupon in September, 1917, the railway company brought an action in equity in the district court of Buffalo county, Nebraska, against *Scharmann*, his wife, as conservatrix of his estate, and Stiles, the Minneapolis attorney, as defendants. In its petition the railway company alleged plaintiff's injury; the appointment of his wife as conservatrix of his estate; that the claim against the railway company had been settled for \$10,000; that said Stiles claimed an interest in the amount which might be paid to said *Scharmann* for such injury by virtue of said contract of employment as attorney to prosecute such claim for damages, and that the amount of said Stiles's claim was \$3,333.34; that said railway company had paid to said conservatrix, the sum of \$6,666.67, and brought into court and deposited with the clerk thereof the balance of said \$10,000, to abide the decision of the court as to which of said parties was entitled thereto. The railway company asked that all of said par-

ties be required to interplead concerning the matters in controversy between them. Summons was served upon Stiles in Minneapolis. He made no appearance in the Nebraska court. The other defendants appeared and answered, alleging that Stiles had no interest in or claim upon the funds involved in the settlement. At a regular term of court a default was entered against Stiles, and, after hearing the proofs, the court made findings that he had no lien upon or interest in such settlement fund. Thereafter Stiles applied to the district court of Hennepin county, Minnesota, to reinstate the cause and allow him to intervene in order to enforce his lien, for the value of his services, against the railway company. A hearing followed, in which the railway company appeared and opposed the claim of Stiles, with the result that Stiles was awarded judgment against the railway company for \$3,333.34, with interest and costs. In answering the contention that the trial court's decision violated the full faith and credit clause of the Federal Constitution, the Minnesota supreme court said: "If the employment was lawful, as determined by the trial court, then it constituted a valid Minnesota contract. The action was brought in Minnesota. The court acquired jurisdiction both of the parties and the cause of action. The services were all rendered in this state. Under the Minnesota statute, the intervener had a lien upon the cause of action for his services, from the time of the service of the summons in the action. The deposit with the clerk in no manner affected the res against which Stiles sought to impress a lien. Nor did it afford a basis for the service of the summons outside of the state, so as to give the Nebraska court jurisdiction."

It seems to me that neither the principle invoked nor the reasoning applied in the Scharmann Case tends to support the contention that the Federal court ought not to be permitted, or afforded an opportunity, to determine the questions presented in this litigation. If anything, the reasoning applied in that case tends to support the contrary contention. The action in which Simon rendered services was pending in the Federal court. The second action was also pending there. That court had complete jurisdiction of both actions, of the parties, and of the cause of action itself. According to the Scharmann Case, the Federal court had and retained jurisdiction of the res against which the lien might be impressed, even without the entry of an order such as that entered by the Federal court in this case.

In the majority opinion it is said: "In this case, the plaintiff is not subject alone to principles of equitable consideration, but to conscionable dealing as an officer of this court. In equity, and as an officer of this court, his contract fairly and justly made with his client for the enforcement of his client's rights should undoubtedly be upheld and enforced for services justly rendered and performed for his client. But in the relation of attorney and client there exists besides, other considerations, the duty of an attorney, as an officer of this court, to so act in the just expedition of his former client's cause, without seeking any sum due or unconscionable advantage by reason of his retainer based alone upon the plain absolute terms of the contract." It seems that the majority members invoke and seek to apply the power sometimes asserted, especially by the English courts, that a court of equity may compel its own officers to do justice, "even where the circumstances would give rise to no legal right, and perhaps not even to a right which could be enforced in a court of equity against an ordinary litigant." See *Re Thellussen* [1919] 2 K. B. 735, 88 L. J. K. B. N. S. 1210, 35 Times L. R. 732, 63 Sol. Jo. 788, 147 L. T. Jo. 292; *Re Condon*, 30 L. T. N. S. 773, 43 L. J. Bankr. N. S. 107, 22 Week. Rep. 937, L. R. 9 Ch. 609; *Re Carnac*, 54 L. T. N. S. 439, L. R. 16 Q. B. Div. 308, 54 L. T. N. S. 439, 34 Week. Rep. 421.

While I am entirely agreed that contingent-fee contracts should be subject to the supervision of the courts, I had always supposed that the proper way to bring this about is by appropriate legislation. See 2 R. C. L. pp. 1036-1038. But, assuming for the sake of the argument that a court may, by the exercise of the power which it has over its own officers, say to an attorney that it will not permit him to collect the compensation agreed upon in a "contract fairly and fully made with his client," then it seems to me that this furnished an added reason why the matters involved in this case should be determined by the Federal court. The actions and dealings which lie at the foundation of and constitute the basis of the rights of the respective parties were had in connection with litigation pending in that court. It was an action pending in, and appearing upon the calendar of, that court, which it was sought to dismiss. It was as officers of that court that Simon appeared in the first action, and Jacobson & Murray appeared in the second action. It was in that court that Franz sought to dismiss the action instituted by Simon

in order that he might obviate the plea of a former action pending, which had been interposed by the railway company in the second suit. It was that court which conducted the hearing upon the motion to dismiss, and entered the order permitting a dismissal only on the condition that the defendant retain an amount equal to that which Simon was entitled to receive under the terms of his contract, "pending the further order of" that court, "determining the amount due said Charles Simon under his contract with Franz."

When this case is disposed of on the principles enunciated in the majority opinion, the result will be that the state courts will adjudicate the controversy by applying their judgment as to what is right and conscionable between attorney and client, or between attorneys, in matters which arose, incidental to litigation, in the Federal court,—matters which that court has expressly reserved jurisdiction to determine. It seems to me that the orderly administration of justice and the deference due to the Federal court require that that court be permitted to dispose of the matters involved herein. I therefore believe that this cause should be held in abeyance until the Federal court has rendered its decision or relinquished its jurisdiction.

BIRDZELL, J., concurs.

ENOCH E. FAUBION, Respondent, v. MINNEAPOLIS, ST. PAUL, & SAULT STE. MARIE RAILWAY COMPANY, a Corporation, Appellant.

(177 N. W. 371.)

Carriers — It was the duty of the defendant to carry the plaintiff safely and afford him safe place to alight.

In an action for personal injuries, where the plaintiff became a passenger on a freight train to an accepted destination, and where, after arrival at such destination, the plaintiff, pursuant to direction of the defendant, alighted after the train had again started, upon the claim that the defendant had

NOTE.—While particular circumstances may, in some cases, justify the court in declaring, as a matter of law, that a passenger is negligent in alighting from a train while in motion, the general rule is that it is a question for the jury to determine, in view of all the circumstances of the particular case, as will be seen

failed to give notice of the arrival at destination, and that he was unaware of such arrival during the time the train was at rest, and where the plaintiff was injured by alighting in a hole, or uneven piece of ground, covered with ice and snow, it is *held*:

1. That it was the duty of the defendant to carry the plaintiff safely to his destination, and to afford him a reasonable opportunity to alight safely at such destination; that this included, as corollary duties, notification of arrival at his destination, and a reasonably safe place where the passenger should alight, or where he did alight, pursuant to the directions of the defendant.

Carriers — defendant's failure to perform duty question for jury.

2. That, upon the record, the failure of such duties on the part of the defendant, and the questions of the exercise of due care by the plaintiff, under the circumstances, were questions of fact for the jury.

Opinion filed March 30, 1920.

Action in District Court, Ward County, *Leighton, J.*, for personal injury.

From a judgment in favor of the plaintiff, and from an order denying judgment non obstante, or, in the alternative, for a new trial, the defendant has appealed.

Affirmed.

John E. Greene and *John L. Erdall*, for appellant.

McGee & Goss, for respondent.

BRONSON, J. Statement. This is an action for personal injuries against a common carrier. The defendant has appealed from the judgment entered upon a verdict of \$1,000 for the plaintiff, and from the order of the trial court denying a judgment non obstante, or, in the alternative, for a new trial.

On February 6, 1918, the plaintiff purchased a ticket for transportation on the defendant railway from Minot to Burlington. His destination was Lloyds spur, a short distance beyond. He was advised by the depot agent that tickets were not sold to Lloyds spur, and that

by reviewing the authorities collated in 21 L.R.A. 715; 22 L.R.A. (N.S.) 741; and L.R.A.1915C, 181,—on negligence of passenger in getting on or off a moving train.

On duty of railroad company as to notification of passenger of arrival of train at station, see notes in 15 L.R.A. 347; and L.R.A.1915C, 664.

On duty and liability of carrier to passenger who alights at points other than regular stations, see note in 51 L.R.A. (N.S.) 904.

he should see the conductor about transportation to such destination. At Minot he boarded a train consisting of a caboose, and some sixteen box cars. The conductor advised him that the train would stop at Lloyds spur. He paid him the extra fare, and received a cash slip therefor. The plaintiff testified that after the train left Burlington it stopped for a time. He did not get off because he heard no announcement made, although he was waiting and listening for the station call, and because he did not see anything that looked like the spur. He saw a passenger get off, walk towards the engine, come back and get on the train. He saw nobody get off; the train then started to move. The brakeman, then on the platform, advised him it was the spur, and told him to get off there. That thereupon he went inside the caboose, got his overcoat, stepped out on the platform, and, immediately, while the train was moving about 2 miles per hour, alighted on the ground, and was thrown so as to break his wrist. That he stepped into a very rough place, covered with ice, a hole there, which caused him to fall. This was the first trip he had made on the train to this spur. Since that time he has made three such trips, and at each time the train stopped, and he alighted at this same place.

The defendants introduced testimony, through their conductor, brakemen, and others, as follows:

Lloyds spur is not a regular stop; it was simply a place for placing empty box cars for loading lignite coal; it had no station or platform; there was no designated place there to remove freight or passengers; on this evening there were some six passengers in the caboose; at this spur the caboose stopped some eighteen or twenty cars to the east thereof; and there it stood some ten or eleven minutes; the conductor made an announcement of arrival before the train stopped. All the passengers for Lloyds spur were unloaded safely; it was the duty of the conductor to see the passengers so unloaded; the conductor saw the plaintiff get off the train that night safely, and saw him going to the south when he left. The rear brakeman and the swing brakeman, both testified that they directed nobody to get off. The train despatcher, on the train, likewise testified that he saw nobody get off after the train stopped and started. A mail carrier, also a passenger on the train, testified that he did not notice whether the plaintiff got off. Another passenger, the Tipple boss for the Lignite coal mines, testified that he saw the plain-

tiff on the steps of the caboose when he walked past after the arrival at Lloyds spur.

Contentions.—The defendant principally specifies error upon the ground that there is no evidence to warrant any finding of defendant's negligence; that the trial court erroneously refused to instruct the jury (in substance) that no duty rested upon the defendant to provide a platform or particular place for passengers to alight; that passengers on this train assumed the risk of being required to get off at such places as the convenience of the train crew in the performance of their duties required; that the condition of ice and snow and unevenness of ground where the plaintiff alighted did not constitute negligence; that the trial court erred in charging the jury that it was the defendant's duty to provide a reasonably safe place where passengers might alight, and so as to permit recovery upon the failure of the defendant to announce the arrival at his destination, and through the act of plaintiff's alighting subsequently, while the train was in motion, upon the direction of defendant's agent.

Decision.—We have examined the instructions of the court and the record at length. We find no error in such instructions or the refusal of the trial court to instruct as the defendant requested. The plaintiff was a passenger. Comp. Laws 1913, § 4638, 3 *Thomp. Neg.* § 2666. It thereupon became the duty of the defendant, as a carrier, to carry the plaintiff safely to his destination, and to afford him a reasonable opportunity to alight safely at such destination. 3 *Thomp. Neg.* §§ 2720–2860; 10 C. J. 821, 822. This includes, as corollary duties, notification of arrival at the destination; a reasonably safe place where the passenger should alight or where he does alight, pursuant to the directions of the defendant. See 3 *Thomp. Neg.* § 2703; see notes in L.R.A. 1915C, 665; 15 L.R.A. 347; 22 L.R.A.(N.S.) 759; and L.R.A.1915C, 189; 10 C. J. 828; see *Haug v. Great Northern R. Co.* 8 N. D. 23, 25, 42 L.R.A. 664, 73 Am. St. Rep. 727, 77 N. W. 97, 5 Am. Neg. Rep. 467; *Watters v. Philadelphia, B. & W. R. Co.* 239 Pa. 492, 86 Atl. 1021; 51 L.R.A.(N.S.) 904. Whether the defendant failed to sufficiently notify the plaintiff of the arrival at his destination; whether the plaintiff should have alighted when the stop was made; whether the plaintiff was directed by the defendant to alight after the train started

again, at his destination; and whether the place where he alighted was reasonably safe for his discharge as a passenger,—were properly questions of fact upon this record for the jury.

Likewise the question of whether the plaintiff failed to exercise due care, under the circumstances, was a question of fact for the jury. *Butler v. St. Paul & D. R. Co.* 59 Minn. 135, 142, 60 N. W. 1090; 10 C. J. 1131. There was a direct and sharp conflict in the testimony upon all these material matters. These were questions for the jury, who evidently believed plaintiff's testimony. The judgment is affirmed, with costs to the respondent.

CHRISTIANSON, Ch. J., BIRDZELL and GRACE, JJ., concur.

ROBINSON, J. I dissent.

E. T. CAREY, Respondent, v. D. J. CAMPBELL, Appellant.

(177 N. W. 372.)

Specific performance — contract must be just and reasonable with adequate consideration shown.

Specific performance will not be enforced unless the contract is just and reasonable and made for an adequate consideration.

In this case the proof fails to show any completed contract.

Opinion filed April 6, 1920.

Appeal from a judgment of the District court of Ward County, Honorable *K. E. Leighton*, Judge.

Reversed.

Ben E. Combs, for appellant.

Any deviation from the terms of the offer contained in the acceptance is deemed to be, in effect, a rejection, and not binding as an acceptance on the person making the offer, and no contract is made by such qualified acceptance alone. *Beisker v. Ambersoon*, 17 N. D. 218, 116 N. W.

45 N. D.—18.

94; *Ness v. Larson*, 170 N. W. 623; *Hamlin v. Wister*, 18 N. W. 145; *Rosenbaum v. Tyska*, 158 N. W. 848; *Carlock v. Johnson*, 165 Wis. 49, 160 N. W. 1053; *Knox v. McMurray*, 140 N. W. 652; *Shumway v. Kitzman*, 134 N. W. 325.

The parties minds did not meet. Under these conditions there can be no contract. *Carlock v. Johnson*, 165 Wis. 49, 160 N. W. 1053.

Nestos & Herigstad, for respondent.

"The contract is complete at the moment that the acceptor deposits the letter of acceptance in the postoffice, postage prepaid and addressed to offerer's proper address." 6 R. C. L. 612; 109 N. W. 191; 6 L.R.A. (N.S.) 1016; Comp. Laws 1913, § 7194.

ROBINSON, J. This is an appeal from a judgment for the specific performance of an alleged contract to sell plaintiff lots 9 and 10, in section 14, township 158, range 87, for \$500. No payment was made nor was any possession given under the alleged contract. The parties remained in precisely the same condition as if they had not attempted to contract. It was made entirely by correspondence, which shows that there never was a compliance with the contract.

Exhibit A.

Gist of Exhibits.

E. T. Carey, Dealer in Land and Live stock.

Donnybrook, N. D., Dec. 25.

I am informed you own the old Commercial Hotel at this place. I might try to sell.

E. T. Carey.

Exhibit B.

Crookston, Minn., Dec. 30, 1918.

E. T. Carey,

Donnybrook, N. D.

I own the hotel property and furniture. If I can get \$700 cash will let it go and pay you \$25.

D. J. Campbell.

Exhibit C.

D. J. Campbell,
Crookston, Minn.

I note you will take \$700, and give \$25 for selling your hotel property. It is no doubt worth that, but I don't know anybody that I can sell it to and would not care to bother with it at that price, though I would give you \$500 and would want abstract showing good title.

E. T. Carey.

Exhibit D.

Crookston, Minn. Jan. 2, 1919.

E. T. Carey,
Donnybrook, N. D.

You say you will give \$500. Well, now, my boy, the property is yours. I inclose abstract. The affidavits are an easy matter to get from someone in your town. You can get them when you wish, but I will not stand expense. If I am going to give it away, I want \$500 net to me, and want to get it off my system within the next few days. You can make out deed on N. D. form and send it along and send money to First National Bank of Crookston, Minn.

D. J. Campbell.

Exhibit E.

Telegram.

Crookston, Jan. 6, 1919.

E. T. Carey,
Donnybrook, N. D.

I have sold hotel property. Return abstract at once.

D. J. Campbell.

Exhibit G.

Donnybrook, Jan. 8, 1918.

First National Bank,
Crookston.

We inclose you our check of \$500, payable to D. J. Campbell, and which you are authorized to deliver him when the inclosed deed to E. T.

Carey has been properly executed and acknowledged. You will collect from Mr. Campbell your charges.

A. W. Spencer, Cashier.

Exhibit F.

Telegram.

Jan. 7, 1919.

J. Campbell,
Crookston, Minn.

I have this day commenced action for specific performance and filed notice of *lis pendens*.

E. T. Carey.

On January 8, 1918, the Crookston bank received and returned the blank deed and \$500 check. The deposition of the cashier and Mr. Campbell shows that if Campbell would have accepted the check the bank charges on it would have been from \$2.50 to \$5. Then, it appears that on January 6, 1919, the defendant, by telegram, revoked his offer to sell, and he never had an opportunity to accept \$500 net to him.

So there was never any completed contract. But if there had been a full and complete contract, still, in the opinion of the writer, specific performance should be denied, because the case presents no equity, and does not appeal to the conscience of the court. In an action for specific performance there should be some showing beside a bare naked contract, a showing of the character and value of the property, or of part performance, or of something to appeal to equity.

True it is presumed that the breach of an agreement to transfer real property cannot be adequately relieved by pecuniary compensation. Comp. Laws § 7194. But that presumption may be rebutted and is rebutted and disproven by the letters of the plaintiff showing the character of the property. Specific performance will not be enforced unless the contract is just and reasonable and made for an adequate consideration. § 7198. In this case the proof fails to show any completed contract.

Judgment reversed and action dismissed, with costs of both courts.

GEACE and BRONSON, JJ., concur.

CHRISTIANSON, Ch. J. (dissenting). I am unable to agree with the majority member that the proof in this case fails to show a complete contract. In my opinion, it does show such contract.

The evidence shows that in December 30, 1917, the defendant, Campbell, wrote the plaintiff, Carey, in regard to the real property in controversy. In that letter he said: "Wish you would take charge of it, close up the doors and windows, and rent it if possible. If you cannot rent it, and happen to find anyone that would move in and take care of it, have them do so; and I wish you would write me what condition the place is in, state what you think it is worth and the prospects of selling it, and also send me a list of the furniture, dishes, etc. If I can get \$700 cash for it I will let it go, think it should be worth more, but I want to clean up, and if you can make a sale at that price I will pay you \$25, in fact, I will pay you that much when it is sold whether you make the sale or not, so you will get something."

The plaintiff replied to this by letter dated December 31, 1917. In such letter he said: "I note you say you will take \$700 and give \$25 for selling it. It is no doubt worth that, but I don't know of anybody I can sell it to, and I would not care to bother with it at that price, though I would give \$500, but I would want an abstract showing good title and free from any encumbrance." The defendant, Campbell, replied by letter dated January 2, 1918. He said:

"You say you will give \$500. Well, my boy, to show you my heart is in the right place the property is yours. I believe in quick sale and small profits and always willing to let the other fellow make something, and I am sure that you will make good on this as you are on the ground where you can fix it up a little and trade it to some guy as a real hotel.

"Inclosed you will find the abstract. You will note that I have had attorneys at Minot examine it under date of September 27th. The personal property tax of \$49.94 has been paid by Mike King, at least he has written me that he has paid them. The affidavits they mention is an easy matter to get from someone in your town. You can get them when you wish, but I will not stand the expense connected therewith. If I am going to give it away I want the \$500 net to me, and want it off my system within the next few days, as I expect to go away for a month or more, so I trust you will act accordingly.

"Please acknowledge receipt of the abstract and you can make out the deed on the N. D. form and send it along for the signature of my wife; her given name is Kathryn. Send deed and money to the First National Bank, Crookston, Minn.

Yours truly,
D. J. Campbell."

It seems to me that this evidences a complete contract. There was a definite offer from the plaintiff, Carey, in the letter of December 31st, which was accepted by the defendant, Campbell, in the letter of January 2d. What subsequently took place could not and did not affect the terms of the contract so made. It will be noted, however, that the defendant, Campbell, requested that the deed and money be sent to the First National Bank of Crookston. And on January 6, 1918, the defendant caused a deed, ready for execution by defendant, and a cashier's check for \$500 to be transmitted to the bank so designated. The papers were accompanied by the following letter:

Donnybrook, N. Dak. Jan. 6, 1918.

First National Bank, Crookston, Minn.

Gentlemen:—We are inclosing to you herewith our check of \$500 payable to D. J. Campbell, and which you are authorized to deliver to him when the inclosed warranty deed conveying out lots 9- and 10- Sec. 14—158—87 to E. T. Carey has been properly executed and acknowledged. You will kindly return the deed to us and collect from Mr. Campbell your charges.

Yours very truly,

A. W. Flinn, Cashier.

It will be noted that the deed and money were transmitted to the particular party designated by the defendant. Of course, it was obligatory upon the defendants to pay whatever charges might be incidental to the execution of the deed, such as notarial fees. It seems to me that the evidence shows that the minds of the parties met, and that a complete contract was made between them.

It may be noted that while the defendant, Campbell, in his telegram, which is set out in the majority opinion, said that he had sold the prop-

erty, he offered no evidence to that effect, although he testified in the case. Nor did he aver as a defense that he was unable to convey to the plaintiff on account of having sold the property to someone else.

It is true specific performance is not an absolute right in all cases where there is a contract. Applications invoking the equity powers of a court to decree specific performance are addressed to its sound and reasonable discretion, and are granted or rejected according to the circumstances of each case. 36 Cyc. 548; *Hunter v. Coe*, 12 N. D. 505, 512, 97 N. W. 869. "This discretion, is not an arbitrary or capricious one, but a sound judicial discretion, regulated by the established principles of equity. The exercise of such discretionary powers by a court of equity is so far from being an objection, that it lies at the very foundation of all equity, and forms its most peculiar and excellent characteristic, as contradistinguished from the strict, precise, and unyielding principles which govern in the courts of common law." 36 Cyc. 549. And "when a contract of which equity has jurisdiction conforms with certain equitable principles, which are quite limited in number, it is as much a matter of course for a court of equity to decree specific performance as for a court of law to give damages for breach of the contract." 36 Cyc. 550. In this case the trial court, after full hearing and due consideration, awarded specific performance. Under the circumstances established by the evidence in this case, I see no reason for interfering with the judgment. In any event the plaintiff should be permitted to recover whatever damages he may have sustained by reason of defendant's failure to carry out the terms of the contract.

BIRDZELL, J., concurs.

ED POSEY, Appellant, v. SEE & PENCE COMPANY et al., Respondents.

(177 N. W. 671.)

Vendor and purchaser — evidence held to show purchase of contract for sale in good faith without notice of claims.

1. There are practically no questions presented in this case, except questions of fact.

See & Pence Company, by a written contract, sold to one *Gorthy* and one *Nelson* a certain 480-acre tract of land, described in the contract.

Subsequently, See & Pence Company deeded the land to John W. See, subject to the conditions of the contract. *Gorthy* sold his interest to *Nelson*, for \$3,200, for which he took several promissory notes, due and payable at specific dates. He claims that *Nelson*, to secure the notes, assigned the contract to him, and that he assigned it to one *Jones*, as manager for the plaintiff, from whom *Gorthy* claims to have purchased other land. He claims that, in that condition, the assignment, exhibit "H," was deposited with the Stutsman County Bank; that thereafter the name *Jones* was erased, and the name *Nelson* was wrongfully and fraudulently inserted.

The trial court found as a fact that *Gorthy*, for a good and valuable consideration, assigned, transferred, and delivered, to *Carl Nelson*, said assignment, exhibit "H," and that said *Carl Nelson*, for valuable consideration, assigned, transferred, and delivered the same, by an instrument in writing, to *Loran Nichols*, who purchased the contract, in good faith, and without notice or knowledge of the rights or claims of any other party or parties therein.

It is *held*, the evidence sustains this finding of the trial court.

Vendor and purchaser — purchaser of contract held to have properly received a deed from original vendor's grantee.

2. Other facts and circumstances exist in the case, and are fully discussed in the opinion.

It is *held*, there is no reversible error of finding of fact, nor reversible error of law committed by the trial court.

Vendor and purchaser — judgment against alleged assignee of contract held supported by evidence.

3. It is *held*, that the judgment has substantial support in the evidence.

Opinion filed April 13, 1920.

Appeal from judgment of District Court of Stutsman County, Honorable *J. A. Coffey*, Judge.

Judgment affirmed.

Sullivan & Sullivan, for appellant.

See's recognition of the contract, that the contract was existent after the default, waived his right to forfeit or rescind the contract. 39 Cyc. 1394.

The failure of the vendor to restore or tender the purchaser what he

received thereunder voided the purported cancelation. 39 Cyc. 1376-1380.

Where persons purchasing real estate with the knowledge of third persons of an equitable lien thereon sufficient to put them on inquiry, they are not purchasers in good faith without notice. *Trekking v. Momas* (Neb.) 89 N. W. 1005.

A. W. Aylmer and Thorpe & Chase, for respondent.

Plaintiff failed to record his assignment, so that, if he really had any, it was not notice to anyone, having no actual notice. *Marchall v. Farmers Bank*, 47 Pac. 418.

Vendor is not required to regard assignment without notice thereof. 39 Cyc. 1676 (30).

Assignee takes only rights of assignor, whether as against the vendor or against the third persons, and he takes subject to any defense which might have been set up against his assignor. 39 Cyc. 1667 (41-42); 170 N. W. 345.

The vendor, having no notice of plaintiff's claim, was not required to pay any attention to him. Plaintiff was required to give the vendor actual notice. *First Nat. Bank v. Big Bend Land Co.* (N. D.) 164 N. W. 322.

It is not to be presumed that the purchaser had notice of an unrecorded assignment. (Wis.) 148 N. W. 871.

Plaintiff's assignment should have been recorded to give notice. *Comp. Laws 1913*, § 5594; *Bailey State Bank v. Heinse* (Iowa) 160 N. W. 903.

The burden of proof is on plaintiff to establish the disputed allegations of his complaint. 2 C. J. 1272 (14).

Presumption is that alteration, if any, was made before delivery. 2 C. J. 1275 (27); *Cass County v. American Exch. Bank* (N. D.) 83 N. W. 12.

A contract may be waived by abandonment by vendee and his rights thereby extinguished. *Otto v. Freese* (N. D.) 126 N. W. 502; *Mahon v. Leich* (N. D.) 90 N. W. 807; *Wadge v. Kittleson* (N. D.) 97 N. W. 856; *Hollingreen v. Peite* (Minn.) 52 N. W. 266.

Where the agent takes part in an illegal transaction, which is not connected with the principal's business, the law does not presume that he will communicate to the principal the knowledge so acquired. 2

C. J. 871 (15); 21 R. C. L. p. 843 (14); Houghton v. Todd, 78 N. W. 634.

Equity aids the vigilant, and not those who sleep on their rights. Abstract plaintiff's exhibit A; Russell v. Mester, 9 N. W. 420; Webster v. Brown (Mich.) 34 N. W. 676; Mahon v. Leech (N. D.) 90 N. W. 807; Wadge v. Kittleson (N. D.) 97 N. W. 859.

GRACE, J. A clear statement of the facts in this case will clearly present the legal questions in the case, and make a disposition of them a matter of no great difficulty.

On the 31st day of December, See & Pence Company, then owners of the north half and southwest quarter of section 21, township 144, range 63, excepting the right of way of the Minneapolis, St. Paul, & Sault Ste. Marie Railroad Company, entered into a written contract for sale of the same, with one Carl Nelson and A. J. Gorthy, who, at the time of the execution of the contract, paid \$2,000 of the purchase price, which was \$14,149.20. They thereafter paid a further sum of approximately \$2,000, and also paid interest to December 31, 1911.

On or about the 6th day of September, 1911, See & Pence Company deeded the land to John W. See. That deed contained the following clause: "The land hereby conveyed is subject to the conditions of a certain contract, for the sale and purchase of the above-described land, made and executed on the 31st day of December, in the year 1910, by and between the See & Pence Company, a corporation, under the laws of the state of Minnesota, and A. J. Gorthy and Carl Nelson, of Courtenay, in the county of Stutsman and state of North Dakota; and it is hereby expressly understood and agreed that all obligations to be performed under the terms of said contract, by the said See & Pence Company, are assumed by the party of the second part hereto, as part of this transaction and sale."

This deed was recorded in the office of the register of deeds of Stutsman county, on the 7th day of September, 1911.

Subsequently, Nelson purchased the interest of Gorthy in the land for \$3,200, and gave his notes, aggregating that amount, and the same are exhibits in this case, "A" to "F," inclusive.

It is claimed by the plaintiff that, to secure these notes, Nelson executed an assignment of the contract to A. J. Gorthy, who bought a

piece of land from plaintiff, who took these notes in as part payment, and that Gorthy assigned the contract, in writing, to Wm. Jones, as manager for this plaintiff.

It is claimed by plaintiff that Jones received that assignment, which is exhibit "H" in the case, at Courtenay, North Dakota, and that, at that time, the name of Carl Nelson was not in it.

Jones claimed to have placed this assignment in the custody of the Stutsman County Bank, of which Loran Nichols was cashier. The plaintiff, in effect, claims that after the assignment, exhibit "H," was placed in the Stutsman County Bank, the name of Jones was erased, and the name of Carl Nelson inserted therein. An inspection of the assignment, exhibit "H," shows that the name of Jones has been erased, and the name of Nelson inserted in place thereof.

The plaintiff further claims that Nichols, as cashier of the bank, was responsible to the owner of the assignment; that the Stutsman County Bank, through its agent, Nichols, is not a good-faith purchaser, and that neither is the present cashier of said bank, Harry S. Posey, whose name appears on several of the instruments, as a witness.

The assignment, exhibit "H," is dated March 26, 1912. On August 4, 1913, A. J. Gorthy gave another assignment of the same contract, to Carl M. Nelson. The proper execution and delivery of this assignment is in no way called in question.

On December 31, 1912, Carl M. Nelson and wife assigned the contract to Loran Nichols, by exhibit "M." On July 30, 1913, they made a new assignment of the contract, to Loran Nichols, by exhibit "3."

On May 18, 1914, John W. See deeded to Loran Nichols the north half and the southwest quarter of section 21, township 144, range 63. This deed was recorded June 4, 1914.

Loran Nichols and wife, by a mortgage dated March 14, 1914, mortgaged the north half of section 21 to the Union Mortgage Loan Company, for the sum of \$1,087.60, which mortgage became due December 1, 1918, and was recorded on the 5th day of June, 1914. This mortgage was foreclosed, and the sheriff's certificate of sale was issued to the Union Mortgage Loan Company, and dated July 10, 1915, and duly recorded.

The sheriff's certificate of sale was finally assigned to Stutsman

County Bank, and the sheriff's deed was issued to it, on the 13th day of November, 1917, which was duly recorded.

On the 10th day of July, 1915, Loran Nichols and wife conveyed the north half of section 21, by deed, to the Stutsman County Bank, which deed was duly recorded.

The Stutsman County Bank, on the 1st day of April, 1918, by deed, conveyed the said north half of section 21, township 144, range 63, to Harry S. Posey, and the same was duly recorded.

On the 25th day of April, 1916, Stutsman County Bank, conveyed, by deed, all of the southwest quarter of section 21, township 144, range 63 lying north of the main line right of way of the Minneapolis, St. Paul, & Sault Ste. Marie Railroad Company, to one Peter Dahl. This deed was duly recorded; and the remainder of the southwest quarter above described was conveyed by the Stutsman County Bank to Anton Neva, by deed, which was duly recorded.

The record does not disclose a deed from Loran Nichols to the Stutsman County Bank, of the southwest quarter of section 21. The bank transferred this land to Peter Dahl and Anton Neva, as above stated. We think, however, on the whole record, that such transfers were valid, and that the bank had authority and right to make them.

By exhibit "K" Nichols and wife conveyed to Stutsman County Bank, the north half of section 21, township 144, range 63, and the east half of section 25, township 142, range 63. The latter tract is not involved in this action. The southwest quarter of section 21, above referred to, is not included in this deed.

A notice of cancellation of the contract, in due and legal form, dated January 6, 1913, and signed by John W. See, as owner, was personally served upon Carl Nelson and A. J. Gorthy.

A. W. Aylmer was acting as attorney for John W. See, in the cancellation proceedings. According to the testimony, he procured the notice of cancellation to be duly served on Gorthy and Nelson. At about the same time, Nichols wrote Aylmer and told him that he had an assignment of the contract, and asked Aylmer to take the matter up with See, and to learn whether he would approve the assignment. This, See did not do, but he did send a deed to Aylmer, for Nichols, which covered and described the three quarter sections of land in question, which deed was delivered to Nichols after he had procured another

assignment, exhibit "8," from Gorthy to Nelson, and a new assignment from Nelson and wife, to himself, and paid to See the balance of the purchase price.

The assignment of the contract, by Nelson to Nichols, and from Gorthy to Nelson, all having been made prior to the service of the notice of cancelation, if they are valid, it would seem the cancelation was superfluous, and of no great force nor effect, and we think, no further notice need be taken of it.

It is strenuously contended by plaintiff that the assignment exhibit "H" was executed by Gorthy to one Jones, for the plaintiff, or in his interest, and that Jones deposited the same in the Stutsman County Bank, and that thereafter the name of Jones was erased and the name Carl M. Nelson inserted.

While the instrument rather shows that the name of Jones was erased by someone, and the name of Nelson inserted, we think the evidence, as a whole, is insufficient to show that it was fraudulently done.

The finding of the trial court in this respect is as follows: "That on or about the 26th day of March, 1912, said A. J. Gorthy, for good and valuable consideration, assigned, transferred, and delivered to said Carl Nelson, by an instrument in writing dated on that day, all his right, title, and interest in and to said contract of purchase, and in and to said land, said assignment having been introduced in evidence herein, and marked plaintiff's exhibit 'H;' that on or about December 31, 1912, said Carl Nelson, for a good and valuable consideration, assigned, transferred, and delivered to Loran Nichols, by an instrument in writing dated on that day, all of his right, title, and interest in and to said contract of purchase, and in and to said land, such assignment having been introduced in evidence herein, and marked defendants' exhibit 'M & 1;' that said Loran Nichols purchased said contract, in good faith, and without notice or knowledge of the rights or claims of any other party or parties therein."

We think this finding of fact, by the trial court, is fairly sustained by the evidence. The trial court further found, as a fact, that Nichols went into possession of the land on the 31st day of December, 1912, and has ever since been in possession, paying taxes thereon, making improvements, and cultivating and farming the same, and without any notice of any rights or claims of any other person or persons; and that

on about the 4th day of June, 1914, Loran Nichols paid the balance due on said contract, to John W. See, and received from him a warranty deed to the lands described in the contract.

Before See deeded the land to Nichols, he required of him to procure a second assignment of the contract in writing, from A. J. Gorthy to Carl Nelson, and a new assignment from Carl Nelson to Loran Nichols.

The validity of the second assignment is in no manner attacked, so far as its proper execution and delivery is concerned. If it should be claimed that Gorthy had nothing to assign at the date of the second assignment, exhibit "8," and if it be claimed that he, theretofore, had assigned his interest by exhibit "H," nevertheless the second assignment, by Gorthy to Carl Nelson, would tend to prove that his previous assignment, exhibit "H," was to Nelson, and not to Jones, and would have a tendency to sustain defendants' contention, that the assignment, exhibit "H," was to Nelson, and not to Jones.

The trial court, we think, correctly held that exhibit "H" assigned Gorthy's interest to Nelson, and Nelson assigned the entire contract to Nichols, and he properly received a warranty deed from See, for land described in exhibit "G," the contract for deed.

We think this disposes of all contentions in this case. It is hardly necessary to advert to the mortgage, against the north half of section 21 signed by Nichols, which was foreclosed by the Union Mortgage Loan Company. The record shows that this mortgage was foreclosed, and a sheriff's certificate of sale issued to the Union Mortgage Loan Company, which was assigned to the Stutsman County Bank, and it received a sheriff's deed thereon.

The mortgage foreclosure is in no manner successfully attacked, nor any facts set forth, which would show that the mortgage foreclosed was not a valid mortgage, nor anything to show why the sheriff's certificate of sale, and the deed issued thereon, should be set aside.

It must be held that the Stutsman County Bank acquired title to the half section of land referred to, by receiving the sheriff's deed.

In addition to all the foregoing facts, it appears the plaintiff, for approximately seven years after having received the alleged \$3,200 in notes, and the alleged assignment, from Gorthy to Jones, has remained silent; he has taken no action of any kind to assert his right, if any he

had. So far as the record is concerned, there is no showing that he made any attempt to interfere with Gorthy's possession, or gave him or anyone else any notice that he claimed any interest in the land, or the contract. After such long delay, evidence to sustain his contention should be clear and convincing, and such is not in this record.

Such evidence as plaintiff offers is of a very doubtful character; and after the failure, for such a great length of time, to take any steps, of any kind or character, to protect his interests, if any he had, we think such evidence should be weighed in the light of all such circumstances, and, as thus weighed by the trial court and this court, it is held not to sustain the contention of plaintiff.

The appellant has assigned sixteen errors, a portion of which charges error in the trial court, in finding, or failing to find, certain facts to be true. The remainder are errors of law, claimed to have been committed by the trial court. We have examined each of the assigned errors with due care, and find no reversible error therein.

We are of the opinion that the findings of fact of the trial court, in this case, are justified by the evidence, and that the judgment should be affirmed.

It is affirmed. The defendants are entitled to their statutory costs and disbursements on appeal.

CHRISTIANSON, Ch. J., and ROBINSON and BIRDZELL, JJ., concur.

BRONSON, J. I concur in the result.

TIMOTHY P. DALY, Appellant, v. ROBERT D. BEERY, as
County Auditor of Grant County, North Dakota, Thomas McDowell, Henry Hertz, and Peter Ferguson, as the Board of County Commissioners of Grant County North Dakota, Respondents.

(178 N. W. 104.)

Constitutional law — statute providing for state publication committee held valid.

This action involves the constitutionality of chapter 188, Laws 1919.

It is held:

1. That the act does not contravene the 14th Amendment to the Federal Constitution.

Courts — four judges of supreme court necessary to declare statute constitutional.

2. Inasmuch as two of the judges of the supreme court are of the opinion that the act does not violate any provision of the state Constitution, it cannot be said that the act is unconstitutional as violative of the state Constitution, in view of § 89 of the Constitution as amended (Laws 1919, article 25, p. 503); which provides that in no case shall any legislative enactment or law of the state of North Dakota be declared unconstitutional unless at least four of the judges of the supreme court so decide.

Opinion filed April 20, 1920.

Appeal from the District Court of Grant County, *Crawford, J.*
From an order sustaining a demurrer to the complaint, defendants' appeal.

Reversed.

E. R. Lanterman, for appellant.

No bill shall embrace more than one subject, which shall be expressed in its title, but a bill which violates this provision shall be invalidated thereby only, as to so much thereof as shall not be expressed. Section 61 of the state Constitution.

If the title expresses a general purpose, all matters fairly reasonably connected with that purpose and all measures which would facilitate its accomplishment, would not be in conflict with the above position of the Constitution. *Van Hasen v. Heames* (Mich.) 56 N. W. 22; *People v. Linda Vista Irrig. Dist.* (Cal.) 61 Pac. 86, 89; *Re Hegne-Hendrum Ditch*, 82 N. W. 1096.

Any provision of the statute incidentally connected with or leading to the subject or object expressed in the title will be included by it. *State v. Hass*, 2 N. D. 202; *State v. Woodmanse*, 1 N. D. 246; *State v. Barnes*, 3 N. D. 319.

The mandate of the Constitution is observed if the legislation in the body of a statute is germane to the general object expressed in the title of the act in which it appears. The test is whether such legislation is relevant or appropriate to such subject. *El Paso Co. v. Teller*

County (Colo.) 76 Pac. 368; Pioneer Irrig. Dist. v. Bradburg (Idaho) 68 Pac. 295; Diana Shooting Club v. Lamore (Wis.) 89 N. W. 880.

W. A. Anderson and Foster & Baker, as amici curiæ

A county is merely a governmental subdivision of the state, and as such is but an agency of the state, subject to legislative control. Great Northern R. Co. v. Stevens County (Wash.) 183 Pac. 65; Miller v. Henry, 60 Or. 4, 124 Pac. 197; Yellowstone County v. First Trust & Sav. Bank, 46 Mont. 439, 128 Pac. 596; Cumberland County v. Harnett County, 157 N. C. 514, 73 S. E. 195; Burgin v. Smith, 151 N. C. 561, 66 S. E. 607; State v. Board of Comrs. 36 S. D. 606, 156 N. W. 101; 15 C. J. p. 388, § 1, p. 420, § 53, p. 632, § 347.

Rules and regulations for local county government and control, except as otherwise provided for in the Constitution, are as much within the control of the state as those matters which are more general and statewide. Meehan v. Shields, 57 Wash. 619, 107 Pac. 835; Williams v. Morehouse Parish Police Jury, 135 La. 445, 65 So. 604; Burleigh County v. Kidder County, 20 N. D. 27, 125 N. W. 1063; 15 C. J. 632, § 347g 1; 7 R. C. L. 923, 926, note 3,938, § 15, 943, note 9, citing Pier-son v. Minnehaha County, 28 S. D. 534, 124 N. W. 212, 38 L.R.A. (N.S.) 261, 267 and note; note in 27 L.R.A.(N.S.) 1128; Storey v. Murphy, 9 N. D. 115, 81 N. W. 23.

The Constitution does not limit the supervision by the state of fiscal affairs of counties. The state also has the power to say what the duties of county officers shall be. State v. Board of Comrs. 36 S. D. 621, 156 N. W. 101; State v. Lewis, 18 N. D. 133, 119 N. W. 1037.

Section 61 of the Constitution of North Dakota, providing that no bill shall embrace more than one subject, does not require an act creating the commission and a separate act for each duty of the commission. Great Northern R. Co. v. Duncan (N. D.); State ex rel. Gaulke v. Turner, 37 N. D. 635, 164 N. W. 924; 36 Cyc. 951 (II.) and note 6 with case cited therein; 32 Ark. 414, 420, 421, citing Cooley, Const. Lim. 142; Arbuckle v. Pflaeging (Wyo.) 123 Pac. 918.

Sullivan & Sullivan and T. F. Murtha, for respondents.

The Constitution is mandatory upon the court and the legislature.
45 N. D.—19.

State v. Nomland, 3 N. D. 427; Re Corliss, 16 N. D. 427; Cooley, Const. Lim. 36, 6th ed. pp. 88-98, 168, 179, 180; 12 C. J. 470, § 145; State v. Schultz (N. D.) 174 N. W. 81.

The courts take judicial notice of the history of bills on their passage through the legislature. State v. Schultz (N. D.) 174 N. W. 81; Somers v. State (S. D.) 58 N. W. 804; 16 Cyc. 907; Cooley, Const. Lim. 6th ed. p. 162.

The question of whether or not an amendment is such as to change the original purpose of a bill is a question of law for the court. Re House Bill No. 250 (Colo.) 57 Pac. 49; Re House Bill, No. 321 (Colo.) 21 Pac. 472; Sackrider v. Saginaw Co. (Mich.) 44 N. W. 165; Weis v. Ashley (Neb.) 81 N. W. 318; Pottawatomic Co. v. Alexander (Okla.) 172 Pac. 436; State v. Chong Ben (Or.) 173 Pac. 258; 36 Cyc. 951 (11).

The title to the act is not broad enough to cover the designation of official newspapers. Railroad v. Smythe, 103 Fed. 376; Simpson v. Union Stock Yards Co. (Kan.) 110 Fed. 799; Sockrider v. Supervisors (Mich.) 44 N. W. 165; Weis v. Ashley (Neb.) 81 N. W. 318; State v. Chong Ben (Or.) 173 Pac. 258.

"It is not enough that the act embraces but a single subject or object, and that all its parts are germane. The title must express that subject, and comprehensively enough to include all of the provisions in the body of the act." Sutherland, Stat. Constr. p. 87; Astors v. Railroad Co. (N. Y.) 30 N. E. 594; Boom Co. v. Prince, 34 Minn. 79, 24 N. W. 361; State v. Kinsella, 14 Minn. 524, Gil. 305; State v. Smith, 35 Minn. 257, 28 N. W. 241; Brown v. State, 79 Ga. 324, 4 S. E. 861; State v. Everage, 33 La. Ann. 120; Brooks v. People (Colo.) 24 Pac. 553; Montgomery v. State, 88 Ala. 141, 7 So. 51; Igoe v. State, 14 Ind. 239; Sanilac County v. Auditor General, 68 Mich. 659, 36 N. W. 794; Crubbs v. State, 24 Ind. 205.

GRACE, J. The plaintiff, a taxpayer, resident, and elector of Grant county, brings this action against the defendants, to restrain and enjoin them from causing the official printing and publications of the county of Grant to be published or printed in any newspaper of Grant county, other than the Grant County Leader; and from paying, or causing to be paid, any of the money of Grant county, for any county and official printing or publication, to other than the Grant County Leader.

The complaint, in substance, sets forth: That the plaintiff is a resident, elector, and taxpayer of Grant county; that Beery is the duly elected, qualified, and acting county auditor of Grant county, and that the other defendants above named are the duly qualified and acting county commissioners thereof; that the Grant County Leader is printed and published in that county, and was, about the 1st day of August, 1919, by the state publication and printing commission, under the provisions of chap. 188 of the Session Laws of 1919, designated as the official newspaper in and for that county; that the county commissioners above mentioned, in disregard of the provisions of chap. 188, at the first meeting of the board, held in Carson, the county seat of Grant county, did, on the 5th day of January, 1920, by resolution, designate three newspapers, other than the Grant County Leader, as the official papers in and for Grant county; namely, Carson Press, New Leipzig Sentinel, and Shield Enterprise; that none of said papers last mentioned were designated as official newspapers by the state publication and printing commission, though they have complied with the requirements of article 82 of chap. 38, of the Political Code of the state of North Dakota, as contained in the Comp. Laws 1913; that the defendants, at their January, 1920, meeting, awarded to the said three newspapers official reports of the board of county commissioners, for publication, and that they have printed and published the same; and that, unless the defendants are restrained, they will continue to cause the publication of all subsequent proceedings of said board of county commissioners, and all legal and official printing and publication of Grant county, to be published and printed in the three newspapers above mentioned; and, unless restrained and enjoined, will cause the money of Grant county to be expended, for said publication and printing at legal rates.

The defendants demurred to the complaint, on the grounds that it does not state facts sufficient to constitute a cause of action.

The demurrer, in further allegations, challenges the constitutionality of chap. 188, claiming it is unconstitutional on the ground that it is in conflict with chapters 58 and 61, and what is commonly designated as the home-rule provisions of the Constitution, which are §§ 166 to 173, inclusive; and further claim that it contravenes the 14th Amendment to the Constitution of the United States; and maintain that it abridges their privileges and immunities, as citizens of the United States, and

deprives them, as such, of due process of law; and maintain that the law in question confers an arbitrary and unreasonable power upon the state publication and printing commission, by conferring upon them the authority to name the official newspapers of the various counties of the state, in which the publication of process and notices, and other matters, the publication of which is required or authorized by law, must be published. The demurrer was heard before W. C. Crawford, Judge, who entered an order sustaining it.

We may consider the sections of the Constitution involved, in the order in which they are above set forth. Section 58 thereof is as follows: "No law shall be passed except by a bill adopted by both houses, and no bill shall be so altered and amended on its passage through either house as to change its original purpose."

Section 61 is as follows: "No bill shall embrace more than one subject, which shall be expressed in its title, but a bill which violates this provision shall be invalidated thereby only as to so much thereof as shall not be so expressed."

In the preamble, found at the very beginning of our Constitution, and as an appropriate heading to the Bill of Rights, which consists of the first twenty-four sections thereof, stand the following expressive words: "We, the people of North Dakota, grateful to Almighty God for the blessings of civil and religious liberty, do ordain and establish this Constitution."

Section 2 of the Bill of Rights is as follows: "All political power is inherent in the people. Government is instituted for the protection, security, and benefit of the people, and they have a right to alter or reform the same whenever the public good may require."

By § 25 of the Constitution, prior to its amendment by article 26, the legislative power was vested in a senate and house of representatives. Since its amendment, the legislative power is vested in the house and senate, excepting as reserved to the people, by the constitutional amendment to § 25, which provides a method for the initiating of law, by the people, irrespective of the legislature, and the referending of laws enacted by the legislature, each of such powers to be exercised under the conditions named in said constitutional amendment.

The will of the people, as expressed in law by the legislature or a law initiated and adopted by them, or law passed by the legislature

and referended, and favorably passed upon by them, is the supreme law of this state, and can be declared invalid by the courts, only for two reasons, *viz.*: (1) That it is contrary to a provision or provisions of the Constitution of the state; (2) that it contravenes a provision or provisions of the Constitution of the United States.

If a law duly enacted by any of the methods above mentioned is not invalid for either of the causes above stated, it stands as an expression of the supreme will of the people of this state, and, under the Constitution, the courts have neither authority nor power to declare it invalid.

In this connection, it is well to bear in mind, that the powers of government, either state or Federal, are divided into three separate classes, *viz.*, legislative, executive, and judicial. These powers are exercised by three distinct and separate branches of government, corresponding in name with the classes of powers mentioned.

If each of the branches, in consonance with the provisions of the Constitution, would exercise such powers only, as is thus distributed to it, and will fully recognize that the other co-ordinate branches of the government have certain duties distributed to each of them, which it is their right, duty, and privilege under the Constitution, exclusively to exercise, the harmonious operation and conduct of government, and the exercise of governmental powers, would become less difficult, and there would be less conflict in the operation of such delegated powers, and the supreme will of the people, when legally expressed, under the Constitution, would much more readily be carried into effect.

With these observations in mind, we may proceed to determine whether the charge, that chap. 188 is unconstitutional, contains any merit. If it is not unconstitutional, it must follow that it is a valid and subsisting law, and that it has been such ever since thirty days after its adoption by the voters, at an election held pursuant to law, where it was voted upon as a referended measure and there received a majority of the votes voting thereon.

The law is claimed to be unconstitutional, and contrary to the provisions of § 58 of the Constitution, in this,—that the bill for the act was so altered and amended, in its passage in the senate, as to change its original purpose.

Chapter 188 was Senate Bill No. 157. The original purpose of the bill as expressed in its title, as originally introduced, is as follows: "An

Act Creating a State Publication and Printing Commission, Prescribing Its Duties and Powers, and Repealing All Acts and Parts of Acts Conflicting Therewith."

It made no reference to the appointment of an official newspaper in the counties in which should be printed the official proceedings of the board of county commissioners of the county, or in which all legal notices were required to be published. While, in the bill, as amended, and as it became a law, such provisions were inserted.

The full requirements, in this regard, may be better understood from a reading of chap. 188.

It is claimed that this change in the bill, this amendment, changed the original purpose of the bill, and for this reason, the law, under § 58, is rendered unconstitutional. With this contention, we disagree.

The purpose of the original bill was to create a state publication and printing commission, and the prescribing of its duties and powers.

An examination of the title of the bill will disclose that the bill intended to create a state publication commission and a state printing commission. These state the original purpose of the bill.

Publication and printing, each, have a well-understood signification. Publication means to make known, a notification to the public at large, either by words, writing or printing. Printing means the impress of letters or characters upon paper, or upon other substance.

The first implies the means of conveying knowledge or notice; the second implies a mechanical act. Any means, therefore, which would give notice to the public, of any matter desired to be brought to their knowledge, would be classed as publication.

Though the bill as introduced contained no reference to the appointment of an official newspaper in each of the counties of the state, in which all legal publications were required to be made, the original purpose of the bill was not changed by the amendment which did so provide for the amendment, as will be disclosed by a reading of chap. 188, which relates to publication of certain matters, and though they are not included in the original bill, they were matters connected with its purpose, *viz.*, publication.

The title of the original bill also contained words which would direct attention to the fact that the duties and powers of the state publication commission were set forth in the bill, and hence one's attention is there-

by immediately directed to the bill, to determine what those powers are.

If the powers and duties are such that, when exercised, they relate to some matter of which it is desired to give the public notice; in short, if they relate to publication, they are within the purpose of the original bill, and germane to it.

The real purpose and intent of the bill, as amended, and which became chap. 188, is expressed by § 5 thereof, which is as follows: "The intent of this act is to co-ordinate publication of all state legal notices, publications, reports and laws of every kind and nature and under one supervising head, to have definite and certain legal newspapers in this state, so that information can be readily secured concerning any legal publication, and to economize in the matter of state printing; and to keep a complete system of files where legal publications of every kind, in the state can be readily found. This act shall receive a liberal construction in order to effectuate the purposes and intent thereof."

It will thus be seen that the interpretation which the legislature has placed upon the purpose and intent of the law relates largely to publication of certain matters which are of vital interest to the public.

The title of the original bill provides for a state publication commission, and prescribed its powers and duties; and the intent of the law, as amended, is in consonance with the duties, powers, and purpose of the state publication commission, and deals largely with the matter of publication.

So long as the amendment related to publication, or the powers and duties of the commission, it is germane to the purpose expressed in the original bill.

Another very important matter to be taken into consideration is that § 25 of the Constitution has been amended so that the legislative power of the state is not exclusively vested in the legislature.

The people, by constitutional amendment, article 26, reserve the power, first to propose measures and to enact or reject the same, as proposed. Second, to approve or reject, at the polls, any measure or item, section, part, or parts of any measure, enacted by the legislature.

Each of these powers is a legislative power, and, if procedure is had under either, it must be by petition, as prescribed by law.

If the legislature pass a valid act, which does not contain an emergency clause, and the whole of the act is referended, it does not become

a law until approved by a majority of the votes cast thereon, and then not until thirty days after the time of election, at which such law is voted upon.

Article 26 of the Constitution, which amends § 25, provides: A petition initiating or referending a law shall have printed thereon a ballot title, which shall fairly represent the subject-matter of the measure, and the names of at least five electors, who shall constitute the committee for the petitioners, and who shall represent and act for the petitioners.

As we construe that language, it is not necessary that the ballot title on a referendum petition shall be the same as the title of the act referended; that is, it is not necessary that the ballot title be identical in words and language with the title, as passed by the legislature. But, that such ballot title is sufficient, so far as the title thereof is material, if it fairly represent the subject-matter of the measure.

From this it would appear that the filing of a referendum petition, containing a ballot title, as required by article 26, is a separate and independent legislative step, by the people, to legislate upon the subject-matter of the law referended; that the title of the act, as passed by the legislature, has no peculiar bearing, nor does it govern as to what the ballot title on the petition shall be. For, in referending a law, the people are acting in their sovereign capacity, and independent of the legislature, in exercising the legislative power reserved to them.

Under article 26 the secretary of state is required to print and mail to each elector a publicity pamphlet, containing a copy of each measure, together with its ballot title, to be submitted at any election; and, by requiring such publication, the people are acting in the legislative capacity.

When a valid act passed by the legislature has been referended, and the steps required by article 26 have been taken, in referending such act, and a majority of the voters voting upon such act vote favorably thereon, at a state-wide election, or at a special election called pursuant to law, such act becomes a law, by reason of the exercise of the legislative power of the people, and not by reason of the exercise of legislative power by the legislature.

It may be concluded that if the constitutionality of chap. 188 were to be measured by § 58 of the Constitution, exclusively, which we will

show, in a subsequent paragraph, is not true, it would, nevertheless, as we view the matter, be a valid act, as it is not contrary to the provisions of that section, in that the purpose of the act is not changed, though the scope of it, to some extent, may be; but this is not sufficient reason to declare the act a contravention of that section.

This act is also attacked on the ground that it is contrary not only to § 58, but to § 61 of the Constitution.

We will now discuss these two constitutional provisions from another viewpoint, and, perhaps, will be able to show their inapplicability, as organic law, with which to measure the constitutionality of the act in question, in that they are applicable only to acts passed by the legislature, and not to acts initiated by the people or acts of the legislature referended by them. In other words, the Constitution has been amended, and a provision inserted in it, by which the title of laws initiated by the people, or an act of the legislature by them referended, is exclusively governed.

This is a specific provision of the organic law, adopted at a time subsequent to the time of adoption of §§ 58 and 61, which governs, exclusively, in what are necessary requirements of the enacting clause in initiative measures, and, as well, what shall constitute the title thereof, or the title to laws referended, when the same are voted upon, as prescribed by such amendment, which is article 26.

Manifestly, what is a proper title to an initiated or referended law should not be determined by §§ 58 or 61, but by article 26, which was specifically enacted and adopted, as part of the Constitution of this state, for the purpose of determining what is necessary to be stated and set forth in the title of either an initiated measure, or a law which has been referended. The case of *State ex rel. Gibson v. Richardson*, 48 Or. 310, 8 L.R.A.(N.S.) 362, 85 Pac. 225, has been cited in support of respondents' contentions, with reference to chap. 188 being in contravention of § 61 of the Constitution. As we view the matter, that case is not authority for respondents' contention.

Section 20 of article 4 of the Constitution of Oregon provides that "every act shall embrace but one subject, and matters properly connected therewith, which subject shall be expressed in the title."

This is, in substance, largely synonymous with § 61 of our Constitution.

Article 4 of the Constitution of Oregon was amended so as to provide for the initiative and referendum. The provisions therein, in that regard, are largely synonymous with those of article 26, with this important exception,—no provision is made for what shall be stated in the title of an initiated measure, by the petition or otherwise, nor any provision for a ballot title to an initiated measure or a referended act, as does our article 26; and, hence, under the Oregon Constitution, as amended, whether the title to an initiated measure or the title to a referended act embraces more than one subject is a question to be determined by § 20 of article 4 of its Constitution, in the same manner as if the same question arose in reference to an act passed by the legislature, exclusively.

While, on the other hand, § 61 of our Constitution is not the organic law of our state, which determines the validity and sufficiency of a title to an initiated measure, or an act of the legislature referenced to the people, but that is solely and exclusively determined by article 26, which provides what the ballot title shall contain, how it shall be published, and notice thereof brought home to the electors by mailing to them, as provided by law, a copy of the measure initiated or the act referended.

It is clear that § 61 relates to acts passed by the legislature only; of course, at the time § 61 was adopted, the initiative and referendum was not within the contemplation of the members of the constitutional convention.

Article 61 has no reference to the initiative and referendum; those subjects are fully provided for in article 26. It lays down the whole procedure for measures initiated by the people, or an act of the legislature referended by them, and it is self-executing.

Much stress is placed by respondents upon the decision of State ex rel. Standish v. Nomland, 3 N. D. 427, 44 Am. St. Rep. 572, 57 N. W. 85. That case construes § 61 of the Constitution. It does not, and manifestly could not, construe article 26, as that has been adopted at a very late date. That is a well-reasoned case, as applied to the construction of § 61. It has no application, however, in construing article 26, for article 26 is entirely different from § 61; and it may further be observed that article 26 is just as much a part of the Constitution as

§ 61, and it is just as much the duty of the court to give effect to the former as to the latter.

The case of *Gottstein v. Lister*, 88 Wash. 462, 153 Pac. 595, Ann. Cas. 1917D, 1008, cited by respondent, is subject to the same objection as *State ex rel. Gibson v. Richardson*, supra. Article 2 of § 1 of the Washington Constitution, prior to its amendment, was substantially the same as § 25 of our Constitution before its amendment by article 26.

Article 2 of § 1 of the Washington Constitution was amended, so as to reserve part of the legislative power to the people, by the process of initiative and referendum. An examination of the same, as amended, discloses the same condition as exists in the amendment to the Oregon Constitution, to which we have above referred; that is, there is no provision in it, as in ours, that, when a measure is initiated, or an act of the legislature referended, that the petition shall have printed thereon a ballot title, which shall fairly represent the subject-matter of the measure, etc.

Neither does it contain any provision for such extensive publicity as ours; for instance, the mailing of a copy of the initiated measure or referended act, to each voter, etc.

In the absence of providing for a ballot title, if an initiative measure, in the state of Washington were submitted or an act of the legislature were referended, and if the same were adopted by the people, at a proper election, and the constitutionality of such law was thereafter challenged, upon the ground that the title thereof embraced more than one subject, that question would likely have to be determined under § 19 of the Washington Constitution, which is as follows: "No bill shall embrace more than one subject, and that shall be expressed in the title." That provision is the same, in substance, as § 61 of our Constitution.

In other words, in amending article 2 of § 1 of the Constitution of Washington, no provision was made, such as is contained in article 26 of our Constitution, which provides for a ballot title, and determines what it shall contain, thus, clearly making § 61 inapplicable to our initiative and referendum.

The organic law, as contained in article 26, is the organic law in this state, by which the validity of the title of an initiative or referendum

act is determined, while that state is left, exclusively, to their § 19, to determine when the title to a bill is proper and constitutional, and that section when adopted, as our § 61, was intended to apply to acts of the legislatures, and not to the initiative and referendum; yet that state has no other provision to determine the constitutionality of a bill challenged, on the ground of failure of the title to comply with the requirement of the Constitution; and, hence, they determine the constitutionality of the initiative and referendum bills in that state, when challenged on the ground of no proper title, by their § 19, while in this state, under article 26, that subject is specifically taken care of, and it, as our organic law, governs and specifically states what must be in the title of an initiated measure or a referended act.

Both the state of Oregon and the state of Washington have statutory provisions regarding a ballot title for initiated measures and referended acts, as well as provisions for publicity, but they have no such provision in either of their Constitutions.

The act is next attacked on the ground that it is subversive of the so-called home-rule provisions of the Constitution, above mentioned. We think this contention cannot be sustained, and are further of the opinion that there is no contravention of the constitutional provisions relative to the authority conferred upon the county commissioners, to regulate the fiscal affairs of their county.

Section 170 of the Constitution relates to the management of the fiscal affairs of the county, by the chairman of the township boards thereof, when township organization has been adopted by a majority vote of the legal voters of the county voting at a general election. It contains other provisions not necessary to mention here.

Section 171 of the Constitution relates to the continuing of township organization, and provides that where such has been adopted, whether it shall continue, is a matter which may be submitted to the electors of a general election in the manner provided by law, and if a majority of all the votes cast upon such question shall be against said system of government, then the system of township organization shall cease, and the affairs of the county shall then be transacted by a board of county commissioners.

Section 172 is as follows: "Until the system of county government by the chairman of the several township boards is adopted by any coun-

ty the fiscal affairs of said county shall be transacted by a board of county commissioners. Said board shall consist of not less than three and not more than five members, whose terms of office shall be prescribed by law. Said board shall hold sessions for the transaction of county business as shall be provided by law."

Section 173 of the Constitution: "At the first general election held after the adoption of this Constitution, and every two years thereafter, there shall be elected in each organized county in the state, a county judge, clerk of court, register of deeds, county auditor, treasurer, sheriff and state's attorney, who shall be electors of the county in which they are elected, and who shall hold their offices until their successors are elected and qualified.

"The legislative assembly shall provide by law for such other county, township and district officers as may be deemed necessary, *and shall prescribe the duties and compensation of all county, township and district officers.*

"The sheriff and treasurer of any county shall not hold their respective offices for more than four years in succession."

In Funk & Wagnalls, New Standard Dictionary of the English Language, we find the following definition of the word fiscal: "Fiscal—is a financial secretary or minister." "Of or pertaining to treasury or public finances of a government; financial." "Fisc—a treasury of a kingdom or a state; money chest."

In the case of State ex rel. Wiles v. Heinrich, 11 N. D. 37, 88 N. W. 734, this court, speaking through Judge Young, said: "The board of county commissioners have the general superintendence of the fiscal affairs of the county and constitute a board of audit for all claims and demands against their counties, the amounts of which are not fixed by law."

This statement is principally based upon § 1907 of the Revised Codes of 1899, which is as follows: "Board to superintend fiscal affairs of county. It shall superintend the fiscal affairs of the county and secure their management in the best manner. It shall keep an account of the receipts and expenditures of the county and on the first Monday of July annually it shall cause a full and accurate statement of the assessments, receipts and expenditures of the preceding year to be made out in detail under separate heads with an account of all debts payable

to and by the county treasurer, and it shall have the same published in at least one newspaper in its county. If there is no newspaper in the county the same shall be posted up at the usual place of holding its sessions."

Section 1907 of 1899 Codes, in substance, and with an amendment with regard to the time and number of regular meetings of the board of county commissioners, is incorporated in § 3276, Comp. Laws 1913, which defines the duties of the board of county commissioners, with reference to fiscal affairs of the county.

At this point, it is well to note that § 172 of the Constitution names the fiscal affairs of the county as a subject-matter which shall be under the control of the board of county commissioners, while § 173 of the Constitution states that the legislative assembly shall prescribe the duties of the different county officers, and the officers of a subdivision of the county, such as township and district officers, etc. This would include county commissioners. Hence, the duties of the county commissioners with reference to the conduct of the financial affairs of their county are not defined nor set forth by the Constitution. It leaves that to be accomplished by legislation.

From what has been said, it must follow that the duties of the board of county commissioners are such as are defined and enacted by legislative enactment. Whatever powers they possess, with regard to conducting the fiscal affairs of their county, are derived from the authority of law enacted by the legislature, or the lawmaking power of the state.

The very power to designate official newspapers, and to publish their proceedings therein, is not a power possessed by them, by reason of any constitutional provision, or by any so-called home-rule provisions of the Constitution, but it is a duty imposed upon them by law, formerly by §§ 3307 and 3308, Comp. Laws 1913, and now by chap. 188.

It is self-evident that, if the legislature, and the people, by the initiative or referendum, have the sole power of defining, and by due enactment of law, saying what are the duties of the county commissioners, they have the power and authority to have those duties changed or to add new ones, or withdraw, discontinue, or take away a duty once granted to them; as, for instance, the repeal of §§ 3307 and 3308, by

the enactment of chap. 188, in so far as those sections conflict with the latter enactment.

This amounts to no more than a change in the manner of exercising a duty imposed upon the board of county commissioners, by the legislative power, and, it having the right to impose the duty, has the right to make the change, and the authority for doing so is found in § 173.

Chapter 188, in requiring all official publications and the publication of legal notices in one official newspaper of the county, to be designated by the state publication and printing commission, is based upon sound public policy.

It is a certain and direct means of affording residents of the county an opportunity to know of the publication, and gain knowledge of such matters. Even when §§ 3307 and 3308 were in full force, no publications were required to be made therein, excepting those which were official, such as the official proceedings of the board of county commissioners, etc. It contained no requirement, nor was there any other law requiring publication of legal notices to be made in the official papers.

The result was, as we all know, that in the publication of many legal notices, such as mortgage foreclosure, summons, etc., publication thereof was, designedly, often made in some newspaper in a distant part of the county from where the person entitled to have notice resided. This has often resulted in great loss of property and property rights to the debtor, or the one entitled to receive such notice.

To have one official newspaper in the county in which all legal and official publications must be made is, to a large extent, to eliminate the evil and injustice which too often resulted from permitting legal publications to be made in any newspaper in the county. For this reason, chap. 188 tends to preserve and protect property and property rights, and prevents them from being invaded or taken away, without notice or due process of law.

The respondents have invoked the protection of the 14th Amendment to the Federal Constitution. On this subject, it is only necessary to state that chap. 188 in no way contravenes that amendment.

Article 25 of the amendments to the Constitution amended § 89 thereof, so that amended it reads as follows: "The supreme court shall consist of five judges, a majority of whom shall be necessary to form a

quorum or pronounce a decision, but one or more of said judges may adjourn the court from day to day or to a day certain; provided, however, that in no case shall any legislative enactment or law of the state of North Dakota be declared unconstitutional unless at least four of the judges shall so decide."

The powers of the state government being distributed in three branches, the legislative, executive, and judicial, each of such branches are supreme while acting within their own sphere. Whatever enactments of law may be made by the legislative authority of the state is the law, subject only to the limitations that it must not contravene the provisions of the state or Federal Constitution.

These constitute the only grounds upon which the validity of a legislative act may be attacked, and these are the only grounds upon which the respondents may be heard to attack chap. 188.

In order for this court to declare chap. 188 unconstitutional, it would be necessary under the Constitution as amended, for four judges of this court to concur in the opinion, which would declare that law to be unconstitutional.

The order appealed from is reversed.

Neither party shall recover any costs.

ROBINSON, J., concurs.

ROBINSON, J. This is an appeal from an order sustaining a demurrer to the complaint which challenges the validity of the Printing Act (Laws 1919, chap. 188).

The act in question creates a commission and makes it the duty of the commission to designate in each county a newspaper which shall be the official newspaper of the county until its successor shall be chosen by vote, as provided by chap. 187, Laws 1919. This chapter does provide that "at the first general election . . . after the passage . . . of this act, and at the general election in each even-numbered year, . . . the legal voters in each . . . county . . . shall be entitled to vote for such newspaper in said county as such voter desires to be selected as the official newspaper." Thus it appears the power given the printing commission to designate a newspaper is merely a temporary expedient; it continues only until the voters have a chance to ex-

press their choice. That effectually knocks out all the little merit there may be on the home-rule objection.

The statute was passed by nearly a two-thirds majority in each house. The yeas and nays were entered on the journal. Then a referendum was filed against this and six other acts, which were all duly submitted to the voters at a special election. The submission was pursuant to this constitutional amendment: "The secretary of state shall cause to be printed and mailed to each elector a publicity pamphlet containing each measure, together with its ballot title, to be submitted at any election."

The publicity pamphlet mailed to each registered voter contains a copy of the act, its title, its ballot title, with the arguments for and against it, and in the newspapers the act in question was probably discussed more than any other measure ever submitted to the voters, because so many papers were opposed to it. The result was that nearly 112,000 votes were cast for or against the act, and it was approved by a large majority vote. Hence it has been doubly passed and approved. As the history of the act clearly shows, no one was misled or deceived by reason of any defect in its title. It was passed at the same time as chap. 187, entitled: "An Act Providing for the Selection of One State, County, and Municipal Newspaper in Each County, Prescribing the Manner of Its Selection and Duties." To that title and to chap. 187 there is no objection. The title to chap. 188 is very short. It is, in effect: An Act Relating to the Publication and Printing of Legal Notices; or, an Act Concerning a State Publication and Printing Commission and Prescribing Its Duties. The name of the commission does, to some extent, indicate the line of its duties. It is a commission in regard to printing and publication, and of course it must relate to legal notices and documents, and not to private matters. The title of the act is merely a suggestive name by which it may be called and known. It never should attempt to give the details of the act; it never should exceed two or three lines.

When any measure is submitted to the voters the official ballot contains a short ballot title, thus (S. B. 157—State Publishing and Printing Commission) the regular title of the bill, and the bill itself—and that is all. And when that is shown there is no reason for any deception. The vote on the bill was: Yes, 59,364; No, 52,450. There can

be no just claim that the lawmakers or any voter was misled or deceived, or that the procedure was in any manner deceptive. In the pamphlet mailed to each voter there is a long argument against the bill under this heading: "State Publication and Printing Commission Law—Senate Bill No. 157." But there is not a word of opposition to the title or the manner in which the bill was passed by the legislative assembly. Indeed, such objections would have been trivial and futile. The bill itself was before the voters in plain English, and it was for them to vote yes or no.

Section 61 of the Constitution, relating to the title of a bill, was passed as a direction or mandate to the legislative assembly. It has been liberally construed. It is held as a limitation to prevent deception and incongruous legislation. However, there is no reason why it should apply to an act or a measure submitted to the people, who have power to amend, make, and unmake their Constitution. The purpose of the Constitution was not to place a limitation on the people themselves, but on those to whom they have delegated certain powers, so as to prevent an abuse of the powers.

The rule is that every act passed by one legislative assembly may be repealed or amended by the next legislative assembly; but that rule does not apply to any measure submitted to and approved by the people. It may not be amended or repealed, except by a two-third majority of all the members elected to each house. It is, in effect, a constitutional amendment, and as such it should be respected by the courts. Nothing would seem more grossly absurd than for the court, on a trivial objection to a matter of procedure, to hold void an act approved by nearly two thirds of the lawmakers, and then by a great majority of the voters.

A recent amendment to the Constitution indicates the people have come to learn that judges are not infallible, and it is well to limit the power to annul even an act of the legislative assembly. It is provided: The supreme court shall consist of five judges, and no legislative enactment shall be held void unless at least four of the judges so decide. To this there might well have been added that no measure submitted to and approved by the people shall be held void by any court. The power which courts have assumed, by a bare majority of one, to hold void acts of Congress and legislative enactments, may soon be a thing of the

past. If the court have the power, by any majority, to hold void an act submitted to and approved by the people, the power is too dangerous and arrogant for use, except on occasions very extraordinary. The order appealed from is reserved.

BRONSON, J., being disqualified, did not participate.

BIRDZELL, J. I concur in the judgment of this court reversing the order appealed from, though I respectfully disagree with the holding of my brethren, Justices Robinson and Grace, on the basic propositions that the title to the act is good, and that its purpose was not changed during passage. I agree that the act does not violate any provision of the Federal Constitution. This seems to me to be so clear that a statement of reasons is unnecessary.

I am constrained to concur in the order of reversal, by reason of the provisions of the amendment to § 89 of the Constitution, which states that no act of the legislative assembly may be declared unconstitutional by the supreme court unless by the vote of four of the five judges. There is no way to give effect to this constitutional provision unless the members of this court respect it as a part of the fundamental law by directing a judgment to be entered in individual cases which may not conform to their views as to what the judgment should be. Entertaining this opinion, I deem it my duty to vote for a reversal of the order, though disagreeing with two of my associates who have expressed the opinion that the title to the act is sufficient within § 61 of the Constitution, and that the purpose was not changed in violation of § 58. If these two sections of the Constitution were not violated, as is held by Justices Robinson and Grace, the act is clearly constitutional, regardless of the effect of the approval at the referendum election. So far as the disposition of this case is concerned, therefore, the individual views of the members of the court upon other questions which are not decisive would seem to be obiter. And the fact that other questions have been argued and discussed does not alter the situation.

I agree with that portion of the opinion of Chief Justice Christianson, in which the reasons are stated for the conclusion that the title to the act in question was not sufficient and that its purpose was changed during passage. Further than this, my opinion is reserved on all con-

stitutional questions presented, for the reason that they are not decisive of the case.

CHRISTIANSON, Ch. J. The sole question involved in this case is the constitutionality of chap. 188, Laws 1919. The respondents contend that the statute violates the 14th Amendment to the Federal Constitution; and, among others, §§ 58 and 61 of the state Constitution. Mr. Justice Bronson deemed himself to be disqualified and has taken no part in the consideration of the case. Two different district judges successively called in to sit in his place, also deemed themselves to be disqualified. Inasmuch as all members of the court were of the opinion that the act does not contravene the 14th Amendment; and inasmuch as two members of the court—Justices Grace and Robinson,—declared themselves to be of the opinion that the act does not contravene any provision of the state Constitution, no other district judge was called in to sit in the place of Mr. Justice Bronson, for under our Constitution the vote of Justices Grace and Robinson is decisive of the constitutional question. Our Constitution provides: "That in no case shall any legislative enactment or law of the state of North Dakota be declared unconstitutional unless at least four of the judges of the supreme court so decide." Const. § 89, as amended. While I agree that the votes of Justices Grace and Robinson are decisive of the case, I do not agree that the statute under consideration does not contravene §§ 58 and 61 of the state Constitution. On the contrary I am firmly of the opinion that it violates both of these sections. And inasmuch as Justices Grace and Robinson have filed opinions setting forth at some length the reasons why they are of the opinion that the statute does not violate these constitutional provisions, I deem it proper to indicate the reasons why I am of the opinion that it does.

If I correctly read the opinions prepared by Justices Grace and Robinson they are to the effect:

1. That the legislature, in the enactment of the statute under consideration, did not violate, and that the statute does not contravene, either § 58 or § 61; and,

2. That even though the statute as enacted contravened these sections, it became validated by reason of its approval at a referendum election. I do not believe that either contention is correct.

The statute in question was introduced as Senate Bill No. 157, on February 4, 1919. During the course of its passage it was amended. In order to visualize the changes made by such amendments, I set forth in parallel columns the bill as introduced, and as finally enacted and approved.

As Introduced.

A Bill for an Act Creating a State Publication and Printing Commission; Prescribing Its Duties and Powers; and Repealing all Acts and Parts of Acts Conflicting Herewith.

Be it enacted by the legislative assembly of the state of North Dakota:

Section 1. In lieu of the commissioners of public printing, there is hereby created a Commission to be known as the State Publication and Printing Commission.

Section 2. The said commission shall be composed of the state treasurer, attorney general, and the secretary of state; and shall hold their first meeting in the office of the secretary of state within twenty days after the passage and approval of this act.

Section 3. The said commission is authorized to appoint a state printer, who shall also be secretary to the commission, and such appointee may, by the commission be removed with or without cause. The person so appointed must at the time of his appointment be a legal resident of the state of North Dakota for at least one year last past, and be a practical expert printer, and shall receive an annual salary of twenty-four hundred (\$2,400) dollars; he shall perform all the duties now required by law for the expert printer and such other duties as may be assigned to him

As Enacted.

An Act Creating a State Publication and Printing Commission; Prescribing Its Duties and Powers; and Repealing All Acts and Parts of Acts in Conflict Herewith.

Be it enacted by the legislative assembly of the state of North Dakota:

Section 1. In lieu of the commissioners of public printing, there is hereby created a Commission to be known as the State Publication and Printing Commission.

Section 2. The said commission shall be composed of the secretary of state, the commissioner of agriculture and labor, and the chairman of the board of railroad commissioners. It shall hold its first meeting in the office of the secretary of state within twenty days after the passage and approval of this act.

Section 3. The said commission is authorized to appoint a state printer, who shall also be secretary to the commission, and such appointee may, by the commission, be removed with or without cause. The person so appointed must at the time of his appointment have been a resident of the state of North Dakota for at least one year last past, and must be a practical expert printer. He shall receive an annual salary of twenty-four hundred (\$2,400) dollars; he shall perform all the duties now required of the expert printer, and such other duties as may be assigned to him

by the commission hereby established, and shall hold his office in the state capitol.

Section 4. In addition to all the duties and powers now vested by law in the board heretofore known as the Commissioners of Public Printing, the commission shall have power to make all printing contracts in all matters of state printing to be done for or by the state or any of its departments.

by the commission hereby established, and shall maintain his office in the state capitol.

Section 4. In addition to the duties and powers now vested by law in the board heretofore known as the Commissioners of Public Printing, the Commission shall have the power to make all printing contracts in all matters of state printing, and the power to designate a newspaper in every county in the state, and a newspaper or newspapers in the state, in which publications required by law to be published by state officials, must be made. It shall be the duty of said commission to designate in every county of this state a newspaper, which shall be the official newspaper in each county in which it is designated, until its successors shall be chosen as provided by law; and in said newspapers in each county as designated, shall be published official proceedings of the board of county commissioners in each county respectively, and all other notices and publications that are now required by law to be published by county officers in the several counties; all summons, citations, notices, orders and other processes in all actions and proceedings in the supreme, district or county or justice courts, which are or may be hereafter required by law to be published in the respective counties of the state; all publications of every nature that are now or may hereafter be required to be published by state officers; all notices of foreclosure by advertisement or real estate or chattel mortgages or of other liens on real or personal property; all notices of whatsoever kind and character now or hereafter required by law to be published, in said county; provided, however, that in organized cities, town or villages, where no official newspaper is published, said city, town or village, council, com-

mission or board, may designate an official newspaper for the publication of such notices and legal publications as are now or may hereafter be required by law for said cities, towns or villages, including legal notices and official statements of the schools within such cities, towns and villages, and the statements of banks and other corporations therein; but in cities, towns or villages where the commission designates an official newspaper, such notices and legal publications as are now required by law to be published by cities, towns or villages, shall be published in the official newspaper designated by the commission. The commission shall have the power and it shall be its duty to select one or more legal newspapers in this state for the publication of all state legal notices, including notices for the publication of any reports of corporations doing business in this state, now required by law to be published, either from the office of the insurance commissioner or secretary of state or other state officers, and it shall have the power, in addition to the provisions of law now existing, to make contracts with any printer, newspaper publisher, person or corporation, for the publication of any state legal notice, for the printing of the state documents, laws, journals or other state matters, or for the making or providing of state stationery, of blanks and other documents whatsoever in their judgment they may determine so to do. It shall be the duty of every newspaper in this state thus designated by the commission to send to the secretary of such commission, at Bismarck, weekly, two copies of every issue published by it, and the secretary shall keep on file in his office in the state capitol a complete file of every such newspaper, and shall furnish to any person certified copies of matter contained in any of such papers, upon

the payment by such person of the sum of 10 cents per folio for each copy so furnished by him; the fee for such certified copies shall be turned over to the state treasurer on the first business day of each month.

Section 5. The legislative intent of this act is to co-ordinate the publication of all state printing for all state departments under the control of one body.

Section 5. The intent of this act is to co-ordinate publication of all state legal notices, publications, reports and laws of every kind and nature under one supervising head, to have definite and certain legal newspapers in this state, so that information can be readily secured concerning any legal publication, and to economize in the matter of state printing; and to keep a complete system of files where legal publications of every kind in this state can be readily found. This act shall receive a liberal construction in order to effectuate the purposes and intent thereof.

Section 6. All acts and parts of acts in conflict with this act are hereby repealed.

Section 6. All acts and parts of acts in conflict with this act are hereby repealed.

Section 7. An emergency is hereby declared to exist, therefore, this act shall take effect and be in force from and after its passage and approval.

Sections 58 and 61 of the state Constitution read as follows:

"No law shall be passed except by a bill adopted by both houses, and no bill shall be so altered and amended in its passage through either house as to change its original purpose." § 58.

"No bill shall embrace more than one subject, which shall be expressed in its title, but a bill which violates this provision shall be invalidated thereby only as to so much thereof as shall not be so expressed." § 61.

That the courts possess the same power to expound and apply, and that it is their sworn duty to enforce, these provisions, the same as other constitutional provisions, is beyond question. Lewis's Sutherland, Stat. Constr. § 114; Cooley, Const. Lim. 7th ed. pp. 202-214;

25 R. C. L. p. 836. See also *State ex rel. Standish v. Nomland*, 3 N. D. 427, 44 Am. St. Rep. 572, 57 N. W. 85; *Richard v. Stark County*, 8 N. D. 392, 79 N. W. 863. This is especially true under our Constitution, which expressly declares that its provisions "are mandatory and prohibitory unless, by express words, they are declared to be otherwise." Const. § 21; *Ex parte Liddell*, 93 Cal. 633, 29 Pac. 251. And § 61, *supra*, clearly contemplates that the courts shall enforce it and hold invalid statutory provisions violative thereof; it expressly provides that "a bill which violates this provision shall be invalidated thereby only as to so much thereof as shall not be so expressed" in its title.

The two sections of the Constitution are framed in the plainest terms. There is no room for difference of opinion as to what the language employed means. "Words or terms used in a constitution, being dependent on ratification by the people, must be understood in a sense most obvious to the common understanding at the time of its adoption." 6 R. C. L. p. 52. This has repeatedly been emphasized by the greatest authorities on constitutional law.

Judge Marshall said: "The framers of the Constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said." *Gibbons v. Ogden*, 9 Wheat. 1, 188, 6 L. ed. 23, 68.

Judge Cooley said: "Narrow and technical reasoning is misplaced when it is brought to bear upon an instrument framed by the people themselves, for themselves, and designed as a chart upon which every man, learned and unlearned, may be able to trace the leading principles of government." Cooley, Const. Lim. 7th ed. 93.

Judge Story said: "Constitutions are not designed for metaphysical or logical subtleties, for niceties of expression, for critical propriety, for elaborate shades of meaning, or for the exercise of philosophical acuteness or judicial research. They are instruments of a practical nature, founded on the common business of human life, adapted to common wants, designed for common use, and fitted for common understandings. The people make them, the people adopt them, the people must be supposed to read them, with the help of common sense, and cannot be presumed to admit in them any recondite meaning or any extraordinary gloss." Story, Const. § 454.

Sections 58 and 61 of the Constitution run along similar lines. Both were designed to prevent certain pernicious practices which experience had taught would spring up where such provisions did not exist. They were placed in the Constitution to insure better legislation.

In considering a constitutional provision similar to § 61, the supreme court of Michigan, speaking through the great jurist, Cooley, J., said: "The history and purpose of this constitutional provision are too well understood to require any elucidation at our hands. The practice of bringing together into one bill subjects diverse in their nature and having no necessary connection, with a view to combine in their favor the advocates of all, and thus secure the passage of several measures, no one of which could succeed upon its own merits, was one both corruptive of the legislator and dangerous to the state. It was scarcely more so, however, than another practice, also intended to be remedied by this provision, by which, through dexterous management, clauses were inserted in bills of which the titles gave no intimation, and their passage secured through legislative bodies whose members were not generally aware of their intention and effect. There was no design by this clause to embarrass legislation by making laws unnecessarily restrictive in their scope and operation, and thus multiplying their number; but the framers of the Constitution meant to put an end to legislation of the vicious character referred to, which was little less than a fraud upon the public, and to require that in every case the proposed measure should stand upon its own merits, and that the legislature should be fairly notified of its design when required to pass upon it." *People ex rel. Drake v. Mahaney*, 13 Mich. 481.

The court of appeals of New York declared the object of this provision to be "that neither the members of the legislature nor the people should be misled by the title." *Sun Mut. Ins. Co. v. New York*, 8 N. Y. 239. The supreme court of Iowa said: "The intent of this provision of the Constitution was to prevent the union in the same act, of incongruous matter and of objects having no connection, no relation. And with this it was designed to prevent surprise in legislation, by having matter of one nature embraced in a bill whose title expressed another." *State ex rel. Weir v. County Judge*, 2 Iowa, 280.

Ruling Case Law says: "The mischief sought to be remedied by the

requirement of a single subject or object of legislation was the practice of bringing together in one bill matters having no necessary or proper connection with each other, but often entirely unrelated and even incongruous. By the practice of incorporating in proposed legislation of a meritorious character provisions not deserving of general favor, but which, standing alone and on their own merits, were likely to be rejected, measures which could not have been carried without such a device and which were sometimes of a pernicious character were often incorporated in the laws; for, to secure needed and desirable legislation, members of the legislature were, by this means, often induced to sanction and actually vote for provisions which, if presented as independent subjects of legislation, would not have received their support. It was also the practice to include in the same bill wholly unrelated provisions, with the view of combining in favor of the bill the supporters of each, and thus securing the passage of several measures, no one of which could succeed on its own merits. To do away with this hodgepodge or 'logrolling' legislation was one, and perhaps the primary, object of these constitutional provisions. Another abuse that developed in legislative bodies was the practice of enacting laws under false and misleading titles, thereby concealing from the members of the legislature, and from the people, the true nature of the laws so enacted. It is to prevent surreptitious legislation in this manner that the subject or object of a law is required to be stated in the title. While the objects of these constitutional provisions are variously stated, the authorities are agreed that they were adopted to remedy these and similar abuses. The purpose of these constitutional provisions has been summarized as follows: (1) To prevent 'logrolling' legislation; (2) to prevent surprise or fraud in the legislature, by means of provisions in bills of which the titles give no intimation; and (3) to apprise the people of the subject of legislation under consideration." 25 R. C. L. § 83, pp. 834-836. Section 58, *supra*, in express terms says that "no bill shall be so altered and amended on its passage through either house as to change its original purpose." Language could be no plainer. It interprets itself. There is no room for construction. The only difference of opinion that can reasonably arise is as to whether a certain alteration or amendment changes the original purpose of the bill.

Section 61 provides that an "act shall contain but one subject, but

that that shall be expressed in the title. The title thus made a part of an act must agree with it by expressing its subject. The title will fix bounds to the purview, for it cannot exceed the title subject, nor be contrary to it. . . . It is not enough that the act embraces but a single subject or object, and that all its parts are germane. The title must express that subject, and comprehensively enough to include all of the provisions in the body of the act." State ex rel. Standish v. Nomland, 3 N. D. 427, 432, 44 Am. St. Rep. 572, 57 N. W. 85; Lewis's Sutherland, Stat. Constr. § 87. The provision "may be violated in two ways: First. The act must not embrace more than one subject. If it embraces two subjects, and both are fully expressed in the title, still the provision is clearly violated. Black, Const. Law, 288; Cooley, Const. Law, 178. Second. If it embraces but one subject, and that subject be not expressed in the title, the provision is equally violated. This is the clear language of the provision. 'But if the act relates to one subject-matter, which is properly expressed in the title, and also embraces provisions not related to such subject, which are not mentioned in the title, then the foreign or unrelated matters will be separated from the rest of the statute, if possible, and rejected, while the main body of the act will be sustained.' People ex rel. Rochester v. Briggs, 50 N. Y. 553; Cooley, Const. Law, 148." Richards v. Stark County, 8 N. D. 392, 393, 79 N. W. 863.

In the court below and in this court respondents contended:

1. That the matter inserted in Senate Bill No. 157, relating to the designation of newspapers in which all official and legal notices must be published, was variant from and changed the original purpose of the bill.

2. That the title of the act did not express the subject relating to the designation of such newspapers,—i. e., that the title is not broad enough to cover the designation, by the commission, of newspapers in the various counties of the state in which official notices of counties and municipalities, and legal notices of private parties, must be published.

3. That the act embraces more than one subject.

During the entire history of the state there has been a state printing commission. It will be noted that § 1 of the act under consideration recognizes the existence of such commission. The state printing com-

mission was established by a law enacted by the first legislative assembly of the state. See Laws 1890, chap. 119; Comp. Laws 1913, § 45. The commission so created consisted of the secretary of state, state treasurer, and state auditor. Such commission was required to advertise for bids for the printing of the state, and authorized to contract with the lowest bidder for the different classes of printing. Laws 1890, chap. 119; Comp. Laws 1913, §§ 47-51. The act consisted of thirty-six sections. It classified the state printing, and contained full and explicit particulars as to everything relating to state printing, and the duties of the commissioners in regard thereto. Later, provision was made for the employment by the commissioners of public printing of an expert to assist them in the performance of their duties. Rev. Codes 1895, Comp. Laws 1913, § 56.

It appears that the printing for the various educational institutions, as well as some of the printing for the state superintendent of public instruction, was not included in the printing to be contracted for by the commissioners of public printing. At least the laws had been construed as vesting in the boards in charge of the educational institutions the power to contract for the printing to be done for such institutions, and as authorizing the state superintendent of public instruction to contract for some of the printing for his department. See Report of Attorney General for 1915-1916, p. 236. The obvious purpose of Senate Bill No. 157 (as introduced) was to change the personnel of the commission having charge of the state printing, and to confer upon the commission as recreated the functions exercised by the former commission, and bring all kinds of printing for the various state departments under its jurisdiction. It will be noted that no attempt was made (either in the bill as introduced or as enacted) to legislate with reference to all the matters covered by the former law, such as the classification of printing, advertisement for bids, etc. It was apparently the intention that the provisions of the former law should remain in full force and effect as to such matters. In the bill as introduced, the legislature declared the intent to be "to co-ordinate the publication of all state printing for all state departments under the control of one body." Anyone reading the title, and the bill as originally introduced, would have no question as to its purpose.

It will be noted that by the amendment inserted in § 4, the Com-

mission was granted power "to designate in every county of this state a newspaper, which shall be the official newspaper. . . . And in said newspapers in each county as designated, shall be published official proceedings of the board of county commissioners in each county respectively and all other notices and publications that are now required by law to be published by county officers in the several counties, all summons, citations, notices, orders and other processes in all actions or proceedings in the supreme, district or county or justice courts; . . . all notices of foreclosure by advertisement of real estate or chattel notices or of other liens on real or personal property; all notices of whatsoever kind and character now or hereafter required by law to be published." It is further provided that "in cities, towns or villages where the commission designates an official newspaper, such notices and legal publications as are now required by law . . . shall be published in the official newspaper designated by the commission." The publication of such various notices and statements was fully provided for under the former laws. Under the then existing laws, it was the duty of the county commissioners to designate the official newspapers of the counties and the duty of the proper city authorities to designate the official newspaper of the city. That had been the settled law during the entire history of the state. Provision had also been made for the proper qualification of legal newspapers. And legal notices in private matters, such as summonses, citations, foreclosure notices, etc., might be published in any properly qualified newspaper. The amendment in effect repeals or amends all these various statutory provisions.

And, as was said by the supreme court of Michigan, in considering a somewhat similar proposition: "If this legislation can be upheld it would seem that the constitutional provision above quoted is worthless to prevent the evil against which it is manifestly directed." If the constitutional provision is in the way of legislation, and the people desire that a bill may be so altered or amended during the course of its passage in the legislature that it be eliminated from the Constitution, "there is a constitutional way to get rid of this provision. But it is the duty of the courts, while it remains in the Constitution, to see that it is obeyed." *Sackrider v. Saginaw County*, 79 Mich. 59, 44 N. W. 185. See also *Re House Bill No. 231*, 9 Colo. 624, 21 Pac.

472; Re House Bill No. 250, 26 Colo. 234, 57 Pac. 49; Weis v. Ashley, 59 Neb. 494, 80 Am. St. Rep. 704, 81 N. W. 318; Pottawatomie County v. Alexander, — Okla. —, 172 Pac. 436; State v. Chong Ben, 89 Or. 313, 173 Pac. 259, 1173.

Will anyone seriously contend that the publication of proceedings of boards of county commissioners, and of notices of foreclosure sale, summonses, and citations; or the designation of newspapers in which such statements and notices must be published,—was within the “original purpose” of the bill. The question seems too plain for controversy. A comparison of the original bill with the one enacted demonstrates beyond cavil that the matters inserted in § 4 during the course of the passage was wholly foreign to the original purpose of the bill. If § 58 of the Constitution can ever be violated by inserting matter in a bill during the course of its passage, which is foreign to and changes the original purpose thereof, it certain has been violated in this case. While many cases have been cited wherein statutes were held unconstitutional as violative of similar constitutional provisions, in no one was the violation of the provision so palpable as in this case.

It seems equally clear that the matter inserted in the act by the amendments is not expressed in the title. It will be noted that the statute is entitled, “An Act Creating a State Printing and Publication Commission; Prescribing Its Duties and Powers; and Repealing All Acts and Parts of Acts Conflicting Herewith.”

Under § 61, supra, “the title of an act defines its scope; it can contain no valid provision beyond the range of the subject there stated.” Lewis’s Sutherland, Stat. Constr. § 145. But provisions germane to the subject expressed, or which may aid the accomplishment of the purpose expressed in the title, may be included, and will be deemed covered by the title. As was said by the supreme court of Wisconsin: “When one reading a bill, with the full scope of the title thereof in mind, comes upon provisions which he could not reasonably have anticipated because of their being in no way suggested by the title in any reasonable view of it, they are not constitutionally covered thereby. But in applying that rule, this other rule, which has been universally adopted, must be kept in mind. The statement of a subject includes, by reasonable inference, all those things which will or may facilitate the accomplishment thereof.” *Diana Shooting Club v. Lamoreux*, 114

Wis. 44, 50, 91 Am. St. Rep. 898, 89 N. W. 880. Would anyone expect to find in an act entitled as the one under consideration anything in regard to the newspapers in which official proceedings and notices of counties and cities must be published? Would anyone about to foreclose a mortgage or probate an estate have the slightest reason to apprehend that a law entitled as the one before us actually changed the established law of the state with respect to the newspapers in which foreclosure notices and citations in probate proceedings must be published? It seems to me that reasonable men can make but one answer to these questions.

Section 61 of the Constitution was construed and applied in the early history of this state. In *State ex rel. Standish v. Nomland*, 3 N. D. 427, 44 Am. St. Rep. 572, 57 N. W. 85, the section was applied to an act entitled "An Act Creating the Office of the State Board of Auditors and Prescribing the Duties Thereof." The act provided that the board of auditors should designate state depositories, in which the state treasurer should deposit the funds of the state. The court held that the subject of the act was not sufficiently expressed in the title. In the decision in that case this court said: "This court should be careful to destroy no legislation sanctioned by the lawmaking branch of the state government, unless such legislation be a clear violation of the constitutional requirement. But we have no duty higher or more sacred than is the duty to preserve, in all its integrity, every provision in the fundamental law of the state. The provisions of our state Constitution are, by the terms of the instrument itself, declared to be mandatory,—mandatory alike upon the legislature and upon this court. If the legislature in any act disregarded the mandate, it is the duty of this court to nullify the act, and the fact that the abortive legislation may be highly beneficial and salutary in its nature can, in no manner, control that duty. Our constitutional provision is clear, direct, and positive. 'No bill shall embrace more than one subject, which shall be expressed in its title.' What was the subject of the bill in this case? In § 85, *Sutherland Stat. Constr.* it is said: 'It is a matter of some difficulty, in many instances, to determine precisely what is the subject of an act, by reason of the contrariety of its provisions and the complexity of its machinery and aims.' The language is not inappropriate here. Generally speaking, the subject was the state funds; more speci-

fically it was the security and augmentation of those funds; but neither generally nor specifically is the subject expressed in the title,—‘An Act Creating the Office of the Board of State Auditors and Prescribing the Duties Thereof.’ Was the act passed for the purpose of creating that board? Was that the subject—the object—of the act? Clearly not. The board was simply an instrumentality for the accomplishment of some purpose, but what purpose no human foresight could determine from that title. Following that title, the legislature might, with equal propriety, have passed an act relating to any subject upon which the legislature could constitutionally authorize a board to act. We have held that, when the subject of the act was properly expressed in its title, the act might create the means and instrumentalities required for its own accomplishment (*State ex rel. Goodsill v. Woodmansee*, 1 N. D. 246, 11 L.R.A. 420, 46 N. W. 970; *State v. Hass*, 2 N. D. 202, 50 N. W. 254), but it has never been held, under this provision, that where the title announced only the instrumentality, the act itself might announce the subject upon which the instrumentality was expected to operate. Were we disposed to be critical, we might say the title in this case does not even say that much, for it announced but one of several instrumentalities. The action of the governor and state treasurer is just as essential for the accomplishment of the purpose of the act as the action of the board. ‘It is required that an act shall contain but one subject, but that that be expressed in the title. The title thus made a part of an act must agree with it by expressing its subject. The title will fix bounds to the purview, for it cannot exceed the title subject, nor be contrary to it. . . . It is not enough that the act embraces but a single subject or object, and that all its parts are germane. The title must express that subject, and comprehensively enough to include all of the provisions in the body of the act.’ *Sutherland Stat. Constr.* § 87. A single glance discovers that the title in this case meets no single requirement there specified.”

The language and reasoning in *State ex rel. Standish v. Nomland*, *supra*, is directly applicable in this case. The title to the act here in question is in effect like that involved in the *Nomland Case*, for of course all new legislation repeals previous acts relating to the same subject, and wholly in conflict with the new legislation. Here—as in the *Nomland Case*—the title stated that the act created a certain board

or commission and prescribed its duties. The following observation by the court in the *Nomland Case* is equally pertinent here: "Was the act passed for the purpose of creating that board? Was that the subject—the object—of the act? Clearly not. The board was simply an instrumentality for the accomplishment of some purpose, but what purpose no human foresight could determine from that title. Following that title, the legislature might, with equal propriety, have passed an act relating to any subject upon which the legislature could constitutionally authorize a board to act."

Clearly the designation of official or legal newspapers is not covered,—or germane to the subject covered—by the title. In fact this was at least impliedly recognized by the legislature which enacted the statute under consideration. The same legislature also enacted an act entitled "An Act Providing for the Selection of One State, County and Municipal Newspaper in Each County, Prescribing the Manner of Its Selection and Duties." Laws 1919, chap. 187. The act so entitled provided that, at the next general election held throughout the state, an official newspaper should be selected by the voters in each organized county in the state, in which all legal notices and official statements and advertisements should be published. (The language relating to the notices to be so published is identical with that already quoted, which was inserted in Senate Bill No. 157 by amendment during the course of its passage.) This title of chap. 187 indicated that the purpose of the act was to provide for the selection of a newspaper "in each county" to prescribe "the manner of its selection," and to prescribe the duties of such newspaper. The purpose of the act was as stated in the title. Yet, Senate Bill No. 157 purports to legislate upon every matter covered by chap. 187, Laws 1919,—it provides for the selection of a newspaper in each county, prescribes the manner of its election, and the duties of such newspaper. Compare the titles of the two acts:

"An Act Creating a State Publication and Printing Commission; Prescribing Its Duties and Powers; and Repealing All Acts and Parts of Acts in Conflict Herewith." Laws 1919, chap. 188.

"An Act Providing for the Selection . . . of One State, County and Municipal . . . Newspaper in Each County, . . . Prescribing the Manner of Its Selection and Duties." Laws 1919, chap. 187.

Can it be said that the title of chap. 188 covers the subject stated in the title of chap. 187? It seems to me that there is no room for a difference of opinion as to how this question should be answered.

But it is contended that §§ 58 and 61 of the Constitution are inapplicable to laws which have been submitted and approved at a referendum election. It is even suggested that an act so approved "is, in effect, a constitutional amendment." This suggestion ignores the fact that a different method is provided for the submission of constitutional amendments, whether proposed by initiative petition or by the legislative assembly, from that provided for the submission of a statute pursuant to a referendum petition.

But even a constitutional amendment does not become effective unless it has been adopted in accordance with the provisions of the existing Constitution. 6 R. C. L. p. 31. And "it is the duty of the courts to enforce provisions of an existing Constitution in reference to matters connected with proposed changes in the Constitution as in other cases." 6 R. C. L. p. 32. See also 6 R. C. L. p. 72. Such rule is established by the overwhelming weight of judicial authority, and has been recognized by this court. In *State ex rel. Fargo v. Wetz*, 40 N. D. 299, 5 A.L.R. 731, 168 N. W. 835, 846, this court, speaking through Mr. Justice Birdzell, said: "If the [constitutional] amendment were not properly submitted, it would unquestionably be the duty of the court to declare it not a part of the Constitution. The provisions of our Constitution are mandatory and prohibitory (§ 21), and, as such, the Constitution construes itself in relation of such a matter as that under discussion. *State ex rel. Woods v. Tooker*, 15 Mont. 8, 25 L.R.A. 560, 37 Pac. 840. Thus, when the Constitution says that 'amendments shall be submitted . . . in such a manner that the electors shall vote for or against each . . . separately' [§ 202] the failure of the proper officials to comply with the direction is necessarily fatal to the attempted amendment. It is the duty of the court to uphold and give effect to every part of the Constitution, and this provision can only be enforced by refusing to recognize as an amendment that which was never legally adopted as such. That this duty has been fully and faithfully discharged by the courts in the past is indicated by the statement of Dodd. After an exhaustive consideration of the experiences of the various states in the submission and adoption of con-

stitutional amendments, he says: 'If a required step is omitted, or is not even in substance complied with, no court has ever upheld the amendment, even though it may have been approved by the people; that is, the constitutional requirements are mandatory, not merely directory, and no court will overlook the entire disregard of even the less important of such requirements. Dodd, Revision & Amendment of State Const. pp. 217, 218.'

In the main, the general principles governing the construction of statutes apply also to the construction of constitutions. Constitutional provisions, however, are intended to establish the frame work and general principles of the government, and it is presumed that they have been more carefully and deliberately framed than is the case with statutes. The fundamental purpose of construction as applied to constitutional provisions is to ascertain and give effect to the intent of the framers and of the people who adopted them. Therefore, in construing a constitutional provision, the court should constantly keep in mind the object sought to be accomplished by the adoption thereof. It is an elementary rule of construction, applicable alike to the statutes and constitutional provisions, that repeals by implication are not favored. It is presumed that all laws are passed, and all constitutional amendments adopted, with a knowledge of those already existing, and that there was no intention to repeal existing provisions without so declaring. "The intention to repeal will not be presumed nor the effect of repeal admitted unless the inconsistency is unavoidable and only to the extent of repugnance." A later and an older provision will, and if is possible and reasonable to do so, be always construed together so as to give effect, not only to the distinct parts or provisions of the latter, not inconsistent with the new law, but to give effect to the older law as a whole, subject only to restrictions or modification of its meanings, when such seems to have been the purpose of the new law. It is the duty of the court to so construe the laws, if possible, that both shall be operative. "There must be such a manifest and total repugnance that the two enactments cannot stand." "One provision is not repugnant to another unless they relate to the same subject and are enacted for the same purpose." Lewis's Sutherland, Stat. Constr. 2d ed. § 247. "An implied repeal on the ground of repugnancy will not result in any case unless both the object and the subject of the statutes

are the same; and if their objects are different both statutes will stand, though both relate to the same subject, because in such case the conflict is apparent only and when the language . . . is restricted to its own object the two will run in parallel lines without meeting." 26 Am. & Eng. Enc. Law, 2d ed. p. 727.

Surely there is no irreconcilable conflict between §§ 58 and 61 of the Constitution and the provisions reserving, and providing for the exercise of, the power of referendum. There is no reason why they may not be read together, and each and all given full effect.

The purpose of the referendum is well known. The power is reserved primarily to enable the people to reject legislation which they deem to be undesirable. It is invoked by those who are dissatisfied with and seek to bring about the defeat of some legislative enactment, and not by those who seek to secure approval thereof. It has never been contended or supposed that the referendum power was reserved for the purpose of having questions relating to the constitutionality of laws submitted to and passed upon at a referendum election. On the contrary, it has been held that constitutional provisions like §§ 58 and 61, *supra*, are as applicable to statutes submitted to a popular vote as to those which become operative without such vote. Ruling Case Law, says: "It has been contended that there is some difference in the rule [as to the applicability of constitutional provisions like § 61] between an act which is submitted to popular vote and one which becomes operative without such vote. But there is no reason or foundation for such a distinction. Presumably a motive which would influence a legislator in voting for the act would equally influence an elector, and a title which would direct the mind of a legislator to the general subject of an act would fairly direct the mind of the voter to the same subject." 25 R. C. L. p. 839. See also *State ex rel. Gibson v. Richardson*, 48 Or. 309, 8 L.R.A.(N.S.) 362, 85 Pac. 225.

In this connection it is well to bear in mind the reason for the rule announced in § 61 of the Constitution. As has been indicated, the purpose of § 61 was to restrict each legislative measure to one "subject" to the end that "logrolling" legislation might never be enacted in this state. It was intended to compel each "subject" of legislation to stand upon its own merits; to afford each legislator an opportunity to vote for or against any question affecting one subject, separately and

independently from his vote for or against any question relating to any other subject, and to prevent the practice of incorporating in proposed meritorious legislation, provisions having no necessary or proper connection therewith, and which provisions might have failed if presented as individual measures. Manifestly the reason for the rule announced in § 61 is as applicable to voters as to legislators, and there is no good reason why the section should not apply as well to measures or propositions submitted to the people as to those submitted to the legislators.

On the contrary the principle embodied in § 61 of the Constitution is generally deemed applicable to propositions submitted at elections. In *Stern v. Fargo*, 18 N. D. 289, 26 L.R.A.(N.S.) 665, 122 N. W. 403, this court said: "Under our system of elections, every voter is entitled to the opportunity to vote for or against any question submitted, separately and independently from his vote for or against other propositions submitted." The case cited involved a bond issue for the construction and installation of a waterworks pumping station, and an electric lighting plant in connection therewith. Paragraph 15 of the syllabus reads: "A resolution adopted by the city council, providing for an election to vote on the issuance of bonds, and a notice by the city auditor of such election, which state the purpose of the proposed bond issue to be 'to defray the cost of building and constructing a new waterworks pumping station and installing therein a new high duty pump and necessary steam boilers, . . . and for the purpose of installing an electric light plant in connection with said pumping station for furnishing street and other lights and power,' states two purposes, and an election held pursuant to such resolution and notice is illegal, and a majority vote in favor of issuing bonds for the purposes stated does not authorize or empower the city council to issue them." In the course of the opinion the court said: "The authorities are nearly unanimous to the effect that a proceeding by which two questions are submitted, when such questions or their subjects and purposes are not naturally related or connected, is invalid, and renders any election in which such questions have been so submitted invalid. . . . Among the reasons why both propositions should not be submitted to a single vote are that our whole election system, whether it relates to candidates or public improvements or works, is built up and founded

on the fundamental principle that every elector shall be given the opportunity to vote for or against any candidate, or any proposition, independent of and separate from his vote for or against any other candidate or proposition. No one would seriously argue that an election was fair which only admitted of the voter voting for or against all the candidates on any one party ticket, and inclosing all the names on one party ticket in a bracket would not make such a proceeding valid. It is equally important that the voter be given the same opportunity in voting on questions not relating to candidates. If two propositions can be joined in such a manner that the voter must vote for or against both, it admits of the submission of a question devoid of merit in connection with one for which there is a pressing demand, and of a weak proposition being carried on the strength of a worthy one."

In *Hughes v. Horsky*, 18 N. D. 474, 122 N. W. 799, the court, in applying the same principle, held that an election to issue bonds for the erection of two separate buildings to be used respectively for courthouse and jail purposes constituted two questions, and that the matter must be submitted in such manner that each voter might vote for or against each proposition independently of the other.

The reasoning in these cases is equally applicable to statutes submitted to the people for approval or rejection. Take the statute under consideration: A voter might be perfectly willing to change the personnel of the printing commission and extend the powers of such commission so as to embrace the printing for all the state departments and institutions, and yet absolutely opposed to making any change in the existing laws with respect to the designation of official newspapers of counties and cities, or in the laws relating to the newspapers in which private legal notices must be published. Certainly there is no necessary or proper connection between state printing and publication, and the publication of official proceedings of county commissioners, of the publication of citations in private proceedings and notices of foreclosure sales. And yet a voter at the referendum election was confronted with a situation where he either had to accept or reject all propositions; that is, he was put in a position where, in order to approve of the proposition that all state printing should be done under the supervision of the state printing and publication commission, he must also approve of the

propositions that such commission be authorized to designate all newspapers in which official and private notices required to be published under the laws of this state must be published; and that all such notices must be published in the papers so designated.

Clearly the reason for the rule embodied in § 61 is applicable as well to measures which have been submitted at a referendum election as to measures against which the power of referendum has not been invoked. Certainly no intent has been manifested to withdraw measures submitted at referendum elections from the operation of said section. The provision under which the act in question was referred provided: "The veto power of the governor shall not extend to measures initiated by or referred to the electors. No measures enacted or approved by a vote of the electors shall be repealed or amended by the legislature, except upon a ye and nay vote upon a roll call of two thirds of the members elected to each house." Hence, it is apparent that the framers of the provision under which the referendum election involved in this case was held had in mind, and clearly evidenced their intent, to limit the power of both the governor and the legislature in regard to measures which had been submitted to and approved by the electors. And they doubtless were also aware of the pending constitutional amendment tending to limit the power of the supreme court to adjudge legislation to be unconstitutional. If there had been any intention of further curtailing the power of the courts as to ruling upon the constitutionality of measures which received the approval of the electors at an election; or if it had been the intention to place measures which had been approved at a referendum election upon a different plane (so far as the power of the courts was concerned)—from measures which had been so approved, such intention would doubtless have been expressed in positive and unmistakable terms.

"The general rule is that an unconstitutional statute, though having the form and name of law, is in reality no law, but is wholly void, and legal contemplation is as inoperative as if it had never been passed. Since an unconstitutional law is void, it imposes no duties and confers no power or authority on anyone; it affords protection to no one, and no one is bound to obey it, and no courts are bound to enforce it."

6 R. C. L. p. 117.

The members of the court are all agreed that § 61 of the Constitu-

tion still applies to laws enacted by the legislature, and which have not been submitted to and approved by the electors at a referendum election. In other words, all are agreed that a law enacted by the legislature in violation of § 61 of the Constitution is invalid as enacted, but it is contended that this invalid measure becomes valid if the power of the referendum is invoked and it is sustained by the electors at a referendum election. It is difficult to see why a measure void because enacted in a manner forbidden by the fundamental law of the state should become valid because it is of such nature that a sufficient number of the electors of the state are so dissatisfied with it that they seek to have it defeated by means of the referendum. The result is that a measure enacted in violation of § 61, which is so entirely satisfactory as not to cause the referendum to be applied, will fall, whereas one of such nature as to cause the referendum to be applied may be sustained. Will a referendum election make valid legislation which fails to receive the number of votes in either house as prescribed by the Constitution? Will it validate legislation like that involved in *State v. Schultz*, 44 N. D. 269, 174 N. W. 81, which in effect fails to pass in one of the houses? If measures which are invalid because passed in violation of the mandatory and prohibitory provisions of the Constitution may become valid laws upon receiving approval at a referendum election, then why may not every proposition submitted in the legislature be brought before the electors for ratification, regardless of whether it received the approval of either of the houses in the legislature? While no direct authority on the specific question under consideration has been cited or found, all judicial expressions on analogous or similar questions point one way. Thus in *Bennett v. Drullard*, 27 Cal. App. 180, 149 Pac. 368, the court of appeals of the state of California held that an initiative petition, setting forth an ordinance as an entirety and two alternative provisions, was void, and that no duty rested on the city authorities to eliminate as void the alternative provisions and submit the balance. In *Thielke v. Albee*, 76 Or. 449, 150 Pac. 854, the supreme court of Oregon held that the common council of the city may not initiate an ordinance and submit it to the people as an initiative measure without first passing it. In *State ex rel. Gehlhar v. Boyer*, 84 Or. 513, 165 Pac. 587, the supreme court of Oregon held that while the legislature, under the provisions of the

Constitution, might refer to the people any and all laws enacted by it, that a legislative bill passed by a majority of those present but by less than a majority of the whole membership of the legislature could not be submitted to the electors for approval at an election. In *Tennent v. Seattle*, 83 Wash. 108, 145 Pac. 83, the supreme court of Washington held that where an ordinance was amended and placed on its final reading, and passed in violation of a provision in the city charter to the effect that no ordinance shall be passed on its final reading at a meeting at which it is introduced, such ordinance was not rendered valid by the fact that it was approved by popular vote at a referendum election pursuant to referendum petitions filed against the measure.

In my opinion, at least so much of chap. 188, Laws 1919, as relates to the designation of newspapers by the state printing and publication commission and the requirement that official statements and private legal notices must be published in such newspapers, is violative of the Constitution of this state.

GEORGE McCABE, Respondent, v. C. WILLIAMS and H. L. Stegner, Appellants.

(177 N. W. 378.)

Bills and notes — sale of patent rights not void because of nonstamping on face of notes given.

In an action for the payment of two promissory notes, given in consideration of the right to control the manufacture and sale in North and South Dakota of a patented seed disinfecter, and made payable to the plain-

NOTE.—That many of the states have statutes requiring notes that are executed for the purchase of a patent right, to have the clause "given for a patent right" written or printed in legible letters on the face of the note, will be seen by an examination of the cases in a note in 20 L.R.A. 605, on validity of notes given for patent rights.

On power of state to restrict and regulate the sale or enjoyment of patent rights, see note in 29 L.R.A. 786.

On validity of statute requiring the words "given for a patent right" to be inserted in any obligation, the consideration whereof is a patent right, see note in 91 Am. St. Rep. 83.

tiff or his order at the Stockman's Bank, Gillette, Wyoming, where it appears that the notes do not bear on their face the words "given for a patent right," or similar words, it is *held*:

1. The validity of a sale of an interest in a patent right is not affected by the taking of notes for the purchase price, not stamped as required by § 10,251, Compiled Laws of 1913.

Bills and notes — statute does not declare unstamped note given for patent right void.

2. Section 10,251, Compiled Laws of 1913, does not declare an unstamped written obligation for the payment of money in a patent-right transaction to be void. The penalties of the statute are not to be extended by judicial construction.

Bills and notes — fact that notes are unstamped no defense to payment of notes.

3. Where notes given in consideration of the purchase price of an interest in a patent right are not stamped by the payee in the manner required by § 10,251, Compiled Laws of 1913; and where, in an action by the payee, the maker offered no evidence of any defense to the instrument other than the fact that it was not properly stamped, though other defenses were pleaded, the payee is entitled to judgment for the amount due.

Opinion filed April 21, 1920.

Appeal from the District Court of Burleigh County, *Nuessle, J.*
Affirmed.

E. T. Burke, for appellants.

There can be no recovery on a contract made in violation of a statute as between the parties thereto, or those having notice. 153 N. W. 939; *Franklin v. Bank*, 143 Ga. 51, 84 S. E. 131; *Roth v. Bank*, 70 Ark. 200, 91 Am. St. Rep. 80, 66 S. W. 918; *New v. Walker*, 108 Ind. 365, 58 Am. St. Rep. 47; *Nyhart v. Kubach*, 76 Kan. 159, 90 Pac. 796; *Bank v. Rowland*, 15 Ga. 600, 84 S. E. 89; 8 C. J. 771, 772; 29 L.R.A. (note).

J. A. Hyland and *C. L. McCoy*, for respondent.

"Where the contract is to be performed in a place, other than that in which it is made, the parties, according to the general trend of American authorities, are presumed to adopt the place of performance as the law of the contract." 12 C. J. p. 450; 3 R. C. L. p. 956.

"In the case of a note made in one state and payable in another the

maker will be held liable according to the law of the place where it is payable." 3 R. C. L. p. 1137.

As to the constitutionality of § 10,251. Const. art. 1, § 8; U. S. Rev. Stat. § 4898; *J. H. Clark Co. v. Rice*, 106 N. W. 230.

"The monopoly which a patent grants is a property right created under the Constitution and laws of the United States, and by these laws made assignable." *Holliday v. Hunt*, 70 Ill. 111; *Castle v. Hutchinson*, 25 Fed. 394; *Cranson v. Smith*, 37 Mich. 311; *Wilch v. Phelps*, 14 Neb. 137.

On Petition for Rehearing.

BIRDZELL, J. A petition for rehearing has been filed, and, in view of the petition, it has been deemed advisable, for reasons which will be stated, to substitute the following as a more ample statement of the reasons leading to the affirmance of the judgment, as it will more adequately present the views of a majority of the court.

This is an action on two promissory notes,—one for \$400 and the other for \$1,000. They are dated thus: "State of North Dakota, Dec. 7th, 1917," due on the first days of February and April, 1918, respectively, and made payable to the plaintiff at Stockman's Bank, Gillette, Wyoming. The consideration for the said notes was the right to control the manufacture and sale in North and South Dakota (with certain counties excepted) of a patent seed disinfecter. The notes do not bear on their face the words "given for a patent right" or similar words. A jury was waived and the case was tried before the judge of the sixth judicial district, who entered judgment for the plaintiff. This appeal is from the judgment.

The appellants argue that the transaction involved a violation of § 10,251, Compiled Laws of 1913, which makes it a misdemeanor for any person to take an obligation in writing for any patent right, etc., without having written, printed, or stamped thereon in red ink the expression "given for a patent right," or other appropriate words. It is stated that the trial judge based his conclusion of liability upon the proposition that the penal statute referred to is unconstitutional, and the appellants assume that the judgment for the plaintiff is not to be supported unless the statute is unconstitutional. We do not find in the record, however, any warrant for the proposition that the judgment is dependent upon

the unconstitutionality of the statute. Nor does the record disclose that the question is at all decisive in this case.

The only evidence submitted at the trial was the deposition of the payee, the plaintiff, who stated that his residence was at Gillette, Wyoming in Campbell county. It will be observed that the notes were made payable at a bank in Gillette.

The original opinion in this case was prepared by the writer, and concurred in by Mr. Chief Justice Christianson, Mr. Justice Robinson concurring specially. It was there stated in substance that, in the absence of evidence of contrary intention, the validity of the notes in suit were properly determined by the law of the state of Wyoming. 8 C. J. 92-95; 3 R. C. L. 1137. In the petition for rehearing, petitioners' counsel contends, however, that the presumptions affecting the validity of the notes are other than those stated in the principal opinion. In support of the contention made, authorities are cited to the effect that notes given in one state for the price of goods sold in another are governed, as to the validity of the sale, by the law of the state where the goods are sold. Also that the validity of the consideration is to be determined by the law of the *place of the contract*. 8 C. J. 92-96.

We do not question the soundness of the propositions advanced, but there remains in our mind a doubt as to their applicability under the facts in the instant case. In this case there is no question raised as to the validity of the sale or of the consideration. The question is merely as to the validity of the instrument evidencing the sale. Thus, while those who concurred in the original opinion unqualifiedly still incline to the view that the validity of the instruments, under the record made, should be regarded as controlled by the law of the place of performance, they also join in the view of Mr. Justice Robinson that the notes, though not bearing the stamp required by § 10,251, Comp. Laws 1913, are not void as between immediate parties. Since the majority of the members of the court are agreed upon the interpretation and effect of the statute, the original opinion is withdrawn and will not be officially reported,—this opinion being substituted.

The statute upon which the appellant relies to void the note (Comp. Laws 1913,) § 10,251 reads in part as follows:

"Every person who takes any obligation in writing for any lightning rod, or any of its attachments, or for any patent right or claimed to be

a patent right, or for which any stallion or jackass shall form the whole or any part of the consideration, or for any patent medicine, or for which the whole or any part of the consideration shall be the future cure of any disease or ailment, shall, before it is signed by the maker, stamp or write in red ink across the face of such written obligation in plain, legible writing, or print the words . . . 'given for a patent right' [etc.] . . . as the case may require." Violation of the provisions is made a misdemeanor, and, in addition to the punishment, it is provided that the person violating the statute "shall be liable in a civil action to the party injured for all damages sustained by him." An obligation stamped as required by the statute is declared to be non-negotiable and subject to defenses in the hands of every holder or agent. The meaning and purpose of this statute seem to us to be clear. It is designed to prevent the taking of written obligations for the payment of money in lightning rod, patent right, or other transactions which are so frequently tainted with fraud, without being so stamped as to secure to the vendee ample opportunity for interposing any defenses he may have. Inasmuch as these contracts are frequently obtained by irresponsible parties, the efficacy of the statute lies principally in its deterrent effect. Consequently, the penalty is made comparatively severe, and it is not to be extended by judicial construction. *Oates v. First Nat. Bank*, 100 U. S. 239, 25 L. ed. 580; *Grove v. Great Northern Loan Co.* 17 N. D. 352, 138 Am. St. Rep. 707, 116 N. W. 345. If it were intended to add to the penalty of the statute the further penalty that the transaction should be wholly void between the immediate parties, it would seem that the legislature would have so prescribed.

Counsel relies for authority upon adjudicated cases under somewhat similar statutes, of which the following may be said to be typical: *New v. Walker*, 108 Ind. 365, 58 Am. Rep. 40, 9 N. E. 386; *Sandage v. Studabaker Bros. Mfg. Co.* 142 Ind. 148, 34 L.R.A. 363, 51 Am. St. Rep. 165, 41 N. E. 380; *Pinney v. First Nat. Bank*, 68 Kan. 223, 75 Pac. 119, 1 Ann. Cas. 331; *Nyhart v. Kubach*, 76 Kan. 154, 90 Pac. 796; *Citizens' State Bank v. Rowe*, 36 S. D. 151, 153 N. W. 939.

We do not regard the Indiana and Kansas cases as authoritative decisions under a statute such as ours. The statutes under which the Indiana and Kansas cases arose not only purported to regulate the taking of written obligations in consideration of a patent right, but, as a prior

and further means of protection, imposed upon vendors of patent rights the duty of filing in a specified county office a copy of the letters patent and certain affidavits supporting the genuineness of the patent and the right of the vendor to sell. In some of the cases the answer of the defendant showed a violation of this provision of the statute as well as a violation of the section relating to the stamping of the obligation. It is obvious that a statute making it a penal offense for one to sell an interest in a patent without first registering the required evidences of genuineness would affect the entire consideration and the validity of the sale itself. The sale is prohibited; and, being prohibited, no rights between the parties can be rested upon it. In the South Dakota case the court quoted with approval from and followed the Indiana cases. The language quoted, however, was employed in cases where the vendor had violated both statutes; that is, where the sale itself had been made without first registering the patent in the proper county office and the note taken without the appropriate stamp. The illegality of the note in the principal Indiana case relied upon by the South Dakota court does not depend merely upon the failure to properly stamp the obligation, and this seems to have been recognized by the court, for it said:

"A promissory note, executed in a transaction forbidden by statute, is at least illegal as between the parties and those who have knowledge that the law was violated." *New v. Walker*, 108 Ind. 365, 369, 58 Am. Rep. 40, 9 N. E. 386.

The transaction forbidden by statute is the sale without prior registration. The holding of the South Dakota court, being based, as it is, principally upon authorities coming from states where the statutes are so essentially different, does not commend itself to our judgment as a correct interpretation of our statutes.

It is our opinion that the failure to stamp a note or other obligation in the manner required by statute does not render the obligation void. A statute substantially similar to ours was before the court of appeals of New York in the case of *Herdick v. Roessler*, 109 N. Y. 127, 16 N. E. 198. Regarding its effect upon the note, the court, speaking through Andrews, J., said (page 133):

"The state law operates upon the thing taken for the right sold, when that is a negotiable instrument, by requiring the consideration to be plainly expressed, and thus subjecting the instrument, when trans-

ferred, to the same defenses in the hands of the transferee as in the hands of the original holder. *The statute does not make the note illegal*, although the statutory words are omitted, nor does it take from a bona fide transferee for value before maturity, without notice of the consideration, the protection accorded to commercial paper by the law merchant." See also to the same effect, *Tod v. Wick Bros.* 36 Ohio St. 370-386.

In *Streit v. Waugh*, 48 Vt. 298, Justice Redfield construed a similar statute in the same way, saying (page 300):

"The statute does not declare the sale of patent rights unlawful; nor prohibit actions founded on notes given for such sales. The purpose of the statute was, obviously, to prevent the transfer of notes given for the purchase of such property, into the hands of innocent and bona fide purchasers. The second section requires the person taking such note to insert therein the words, 'given for a patent right,' and declares all such obligations, if transferred, subject to all the defenses to which they would be subject if owed by the original promisee. If the patent right was good and valuable, and an adequate consideration for the note, *the statute does not say that the promisor could defend against the note because these words were omitted; but that the transferee shall stand like the promisee as to all just and legal defense.* The case does not state that there was fraud in the sale of the patent right, or any actual infirmity in the note. We think the omission of Conkling to insert in the note the words 'given for a patent right' does not render the note void, and does not preclude the plaintiff's recovery on the note."

In Arkansas, where the statute expressly provided that a note not executed and stamped in the manner required by statute should be "absolutely void," it was held that an action could be maintained by a seller who had violated the statute to recover on the original contract of sale. In speaking of the effect of the statute, the court, in *Roth v. Merchants' & Planters' Bank*, 70 Ark. 200, 91 Am. St. Rep. 80, 66 S. W. 918, said:

"The object of this statute was to save a vendee of 'any patent machine, implement, substance, or instrument of any kind or character whatsoever,' all the defenses he may have to an action on his note for the purchase money, and to prevent the loss thereof by a transfer of the note to an innocent holder before maturity. The failure to comply with the statute does not affect the validity of the sale, but renders only the

note absolutely void. The penalty does not reach beyond the object to be accomplished. Though the note may be void, the vendor can recover whatever may be due him on the contract of sale from the vendee."

Our statute does not go to the length of the Arkansas statute in declaring the instrument to be "absolutely void," and neither do we have a statute which purports to forbid the transaction; that is, the sale, until evidences of genuineness are made a part of the public records. We think it clear, therefore, that the sale is valid, though, in taking the obligation without properly stamping it, the purchaser shall have incurred the penalties of the statute. If, as between the immediate parties, the contract of sale is valid, we can see no good reason for denying recovery in an action on a note, which the statute has not declared to be void, where the purchaser has had every protection which the statute accords him.

The defendant in the instant case in fact pleaded other defenses than the violation of the statute, and, though the evidence shows that substantial payments had been made, no attempt was made to support the allegations of failure of consideration in the answer. Under our statute and under the record made, we can see no reason for a technical holding that would result in a dismissal of this action and compel the bringing of a separate action upon the original contract of sale.

The petition for rehearing is denied.

CHRISTIANSON, Ch. J., and ROBINSON, J., concur.

To the majority opinion filed January 16, 1920, for which the foregoing opinion is substituted, the following dissent was that day filed:

BRONSON, J. I dissent. This is an appeal from a judgment rendered by the trial court without a jury, in favor of the plaintiff, upon two promissory notes. The record is short; the facts are not disputed; questions of law alone are concerned. Two promissory notes involved were made by the defendant to the plaintiff, the sole consideration therefore being a patent right for a seed disinfector. The notes bear the date, "State of North Dakota, Dec. 7, 1917." Such notes contain no marks of any kind thereupon to indicate that they were given for such patent right.

At the trial in May, 1919, the plaintiff introduced the notes, proved

their execution, and nonpayment, and rested. The defendants thereupon moved for dismissal of the action upon the ground that the notes violated § 10,251, Comp. Laws 1913, and could not be used to sustain any judgment in a court of justice. The defendant then rested and renewed the motion.

The record discloses that thereupon the court, in May, 1919, made its findings of fact and conclusions of law, in favor of the plaintiff without making any specific finding of fact concerning the place of execution of such notes or of the application of § 10,251, Comp. Laws 1913, thereto. Judgment, accordingly, was entered in favor of the plaintiff for the total amount of \$1,503.63, from which this appeal has been prosecuted. The appellant specifies error in the action of the trial court in overruling the objections made and in finding in favor of the plaintiff.

Sec. 10,251, Comp. Laws 1913, provides that every person who takes any obligation in writing for any patent right or claimed to be a patent right shall, before it is signed by the maker, stamp or write in red ink, across the face of such written obligation, in plain legible writing, or print, the words "given for a patent right;" that such obligation so stamped shall not be negotiable, but shall be subject to the defenses in the hands of every holder or owner thereof; that any person who shall violate the provisions of such section is guilty of a misdemeanor, and shall be liable in a civil action, to the party injured, for all damages sustained by him. The substance of the above statute applicable herein has been stated.

It is presumed that these notes dated in North Dakota were executed and delivered in this state. 8 C. J. 88. Two questions of law are presented:

- (1) Is the statute quoted valid and applicable?
- (2) If such statute be valid and applicable, are the notes enforceable in the courts of this state?

On the part of the respondent, it is contended, in part, that the statute is unconstitutional and void for the reason that it serves to interfere with rights granted by the Federal statutes concerning patents and the sale and assignability thereof. The statute involved does not prohibit an action or a recovery upon a note given for a patent right. It does not prohibit any contract for, or any sale or assignment of, a patent right. This action is not brought upon notes bearing the indorsement provided

by statute where the question might arise concerning the validity of the statute restricting the negotiability of such notes. This action is brought upon notes which pretend to be, and might be, based upon some consideration other than that required by the statute to be expressly stated in such cases. For purposes of this case, the statute has simply required that, in addition to the words, "for value received," in such notes, there shall also be a specific statement, further concerning the consideration, namely "given for a patent right." There appears no legal reason why, in this regard, the state may not legislate properly by requiring a statement of the specific consideration in a note as well as by legislating concerning a general consideration required in a note through the words "for value received." See 10 Fed. Stat. Anno. 2d ed. 646, 647; *Patterson v. Kentucky*, 97 U. S. 501, 24 L. ed. 1115; notes in 20 L.R.A. 606, and 29 L.R.A. 788; *New v. Walker*, 108 Ind. 365, 368, 58 Am. Rep. 40, 9 N. E. 386. The statute is held valid. Concerning the right to enforce this obligation in the courts of this state, irrespective of the provisions of the statute, the respondent contends that the notes, being payable in Wyoming, are governed by the laws of that state, and, in the absence of proof to the contrary, that the law merchant obtains: Further, that the statute, in any event, simply takes from such notes the character of negotiability, giving a right of action for damages sustained by the maker, and not prohibiting an action upon such notes, as subject to all defenses. The notes in question were executed in this state, as the respondent in his brief admits. They are sought to be enforced in this state. The law of Wyoming cannot be used as an instrumentality in defeating the penal provisions of a statute applicable to a contract made and sought to be enforced in this state. 8 C. J. 86. The statute is applicable. The statute makes it unlawful to issue notes of this character without a statement thereon of the specific consideration. It makes it unlawful to put into circulation a note which might be presumed on its face to be for some other consideration than that which the statute prescribes. The respondent seeks to enforce not the notes which the statute permits, but notes intended to be different than those prescribed by the statute, and which give an opportunity to the payee to perpetrate wrong and injustice by their circulation. See *Smith v. Wood*, 111 Ga. 221, 36 S. E. 649; *Parr v. Erickson*, 115 Ga. 873, 42 S. E. 240; *Heard v. National Bank*, 143 Ga. 48, 84 S. E. 129;

Roth v. Merchants' & Planters' Bank, 70 Ark. 200, 91 Am. St. Rep. 80, 66 S. W. 918. It is no answer to state that a remedy exists by prosecution of the payee. The statute was enacted for the protection of the public, whether it be maker, or, possibly, subsequent holders of such notes.

The respondent seeks to recover on the specific note; not the obligation or contract, if any, upon which the notes were given. As stated in Wald v. Wheelan, 27 N. D. 624, 631, 147 N. W. 402: "Contracts to perform acts forbidden by express statute, or which subject the parties to punishment, are unenforceable. . . . Would not the enforcement of such contracts by courts be lending the processes of law to promote and encourage disobedience to law?"

The statute being applicable, these notes are unenforceable, as such, in the courts of this state. Norbeck & N. Co. v. State, 32 S. D. 189, 142 N. W. 847, Ann. Cas. 1916A, 229; Citizens' State Bank v. Rowe, 36 S. D. 151, 153 N. W. 939; Sandage v. Studabaker Bros. Mfg. Co. 142 Ind. 148, 156, 34 L.R.A. 363, 51 Am. St. Rep. 165, 41 N. E. 380; Nyhart v. Kubach, 76 Kan. 154, 90 Pac. 796.

The judgment should be reversed and the action ordered dismissed.

GRACE, J., concurs.

BRONSON, J. (upon petition for rehearing.) I dissent. I adhere to the views expressed in my former dissenting opinion herein. The majority opinion now bases its holding upon the ground that the note, not stamped as required by the statute, is not void, and that there exists no reason, technically, upon the record herein, for dismissing this action and compelling the institution of another action upon the original contract of sale. This action is instituted on a note which has been made contrary to an express provision of law. The question is not the technical question of dismissing this action so brought on that note, but rather the question of permitting recovery in the civil courts upon a contract which by statute is made unlawful. Section 5922, Comp. Laws 1913, provides that a contract is not lawful which is contrary to an express provisions of law. Under the majority opinion, as now filed, this contract, though unlawful by statute, is nevertheless not void unless the penal statute expressly so declares it. Upon consider-

ations of public policy it is ordinarily axiomatic that a recovery will not be permitted upon unlawful contracts. See *Wald v. Wheelon*, supra; note in 8 Am. Dec. 691. A rehearing should be granted.

GRACE, J., concurs.

STATE BANK OF SLAYTON, a Corporation, Plaintiff and Respondent, v. MARION EDWARDS and Arthur Johnson, Defendants, ARTHUR JOHNSON, Appellant.

(177 N. W. 677.)

Bills and notes — guaranty — signer of note primarily liable — holder of note may not return payment or cancel security and thereafter collect from guarantor.

When, without any consideration, a person signs his name on the face of a promissory note, he becomes a guarantor of payment and is primarily liable for the debt; but when the debt is paid or secured, in whole or in part, the holder of the note may not return the payment or cancel the security and still collect from the guarantor the whole debt. The payment may not be canceled or the security released, thrown away, or impaired; the security must be held as a trust for the benefit of the guarantor; otherwise, the debt is paid to the extent and value of the security released or made unavailable.

Opinion filed March 19, 1920. Rehearing denied April 29, 1920.

Appeal from the District Court of Rolette County, Honorable C. W. Buttz, Judge.

Reversed.

Verrit & Stormon, for appellant.

Fred E. Harris and *John J. Kehoe*, for respondent.

Having signed the note upon the face, the accommodation maker was a person primarily liable thereon, and the acts of the plaintiff did not release him from his obligation to pay the note. *First Nat. Bank v. Meyer*, 30 N. D. 388, 152 N. W. 657; *Vanderfort v. Farmers & M. Nat. Bank (Md.)* 10 L.R.A.(N.S.) 129; *Cellers v. Mechem (Or.)* 89 Pac. 426; *Wolstenhelme v. Smith (Utah)* 97 Pac. 329; *Anderson v. Mitchell (Wash.)* 98 Pac. 751; *Bradley Engineering & Mfg. Co.*

v. Heyburn, 106 Pac. 170; Richards v. Market Exch. Bank (Ohio) 26 L.R.A.(N.S.) 99.

The plea of payment tenders an affirmative issue, and the burden of proof must be assumed by the party interposing the plea. Gravert v. Goothard (Neb.) 115 N. W. 559; Bossi's Estate v. Baehr (Wis.) 113 N. W. 433; Delana v. Voss (Iowa) 114 N. W. 1076; Youtsey v. Lemley (Iowa) 151 N. W. 491; Tedrow v. Johnson (Iowa) 149 N. W. 645.

ROBINSON, J. On June 30, 1914, defendants made to plaintiff a promissory note for \$1,800, due October 1, 1914, with interest at 8 per cent. Payments were made thus:

December 30, 1915	\$216.00
January 18, 1916, Principal,	\$284.00
November 4, 1916, Paid on interest,	\$121.28
August 8, 1917, Credit,	\$247.40

On June 23, 1919, the jury found a verdict against Johnson for \$1,516 and interest at 8 per cent from December 30, 1916, less the credit of \$247 on August 8, 1917. Judgment was entered against Johnson for \$1,535.29, and he appeals.

The defense of Johnson is that, though he signed on the face of the note, he received no consideration, and he signed only as guarantor or surety; also, that plaintiff has received and accepted payment or ample security for the balance due on the note. It appears that to secure the note and several prior notes, amounting to a large sum, Marion Edwards, the principal maker of the note, conveyed to the bank 441.61 acres of land. And, excepting 80 acres in Pierce county, the land was all sold and applied on the notes in full payment, and a balance of \$247.40 was left to apply on the note in question. In April, 1917, the 80-acre tract was sold to Frank Rumley and he made to Marion Edwards a purchase-money note and mortgage for \$1,600, and interest. Then Edwards delivered to plaintiff the Rumley promissory note and mortgage, with an assignment of the mortgage, and the bank conveyed to Rumley a good title to the 80 acres, which it had held in trust to secure the note in question. The debt to Rumley, the mortgage, and the assignment of the same, were duly recorded. Then,

as it appears, the coupon notes were only 5 per cent, or \$80 a year, while the principal note was for 6 per cent. Edwards asked for a return of the note and coupons, to have the same corrected so as to read 6 per cent in lieu of 5 per cent. The plaintiff bank returned the note and the coupons to Edwards, and no one seems to know what became of them. Rumley refused to pay the mortgage debt without his notes or an idemnity bond. Hence this suit was commenced.

Evidently the Rumley note and mortgage were given to apply on the note in suit, either as an absolute payment or as collateral and in lieu of the lien on the 80-acre tract. The case does not present any question concerning the primary or secondary liability of Johnson. Consequently he was a guarantor of payment, and any payment of the debt or security given for the same at once inured to his benefit. The plaintiff was not at liberty to return a payment or a good and valid security and still hold the guarantor as if no payment had been made or security given. *Scandinavian American Bank v. Westby*, 41 N. D. 276, 172 N. W. 666. Then we have the maxim: "When one of two innocent parties must suffer by the act of a third, he by whose negligence it happened must be the sufferer." *Comp. Laws*, § 7278. If the plaintiff must suffer any detriment from the loss of the \$1,600 note, it should be charged to its own negligence. There is some evidence that plaintiff received the Rumley \$1,600 note and mortgage as payment of the debt, the same as it had received from Edwards other securities in payment of other debts. The sum due the plaintiff was less than \$1,500, and it was the wind-up of a long protracted deal. If the plaintiff did not receive the Rumley note and mortgage as payment, then it was ample security for the debt, and it was given as the close of an old and long-standing deal,—as the final determination of all dealings between the plaintiff and Marion Edwards. If the bank received the note in payment, then it was making about \$100 or more in excess of the interest,—and that was about the way it was doing business. There is no showing that the \$1,600 note or its coupons have been presented for payment. The chances are that it has been lost or mislaid, and that the remedy of the plaintiff is to recover on it as on a lost note. Had the plaintiff retained the Rumley note, and had it offered to transfer and deliver the same and the mortgage to Johnson, then it would have been in a position to maintain this action. Then there

could be no defense only that the note and mortgage had been received in absolute payment.

Manifestly the court erred by striking from the answer all that was alleged concerning the Rumley note and mortgage, either as payment or as security, and by directing the jury to disregard all evidence concerning the same.

Judgment reversed.

BRONSON, J. I concur in result.

GRACE, J. (specially concurring). I specially concur in the opinion of the court, as written by Mr. Justice Robinson, upon the ground that the debt upon which suit was brought was, by the original debtor (Edwards), secured by a mortgage on a certain 80-acre tract of land, which mortgage was given to secure the \$1,600 note; the note and the recorded mortgage were delivered to the plaintiff as collateral security.

It was the duty of the plaintiff, upon receipt thereof, to preserve such collateral, and to use ordinary care and vigilance in doing so. He could not dispose of it, nor convert it to his own use, nor permit it to be dissipated or wasted by his negligence, without being accountable to Johnson.

This principle is fully discussed in the opinion of the court, and in the case of *Scandinavian American Bank v. Westby*, 41 N. D. 276, 172 N. W. 666, cited in the opinion of the court.

BIRDZELL, J. (concurring specially). I concur in the reversal. It appears that, upon motion of the plaintiff's attorney, the court, at the beginning of the trial, struck out the answer in so far as it related to allegations of suretyship, and the judge specifically stated he was of the opinion that the defendant was primarily liable upon the instrument and could only be relieved by any act of the holder that would relieve one primarily liable. It clearly appears that the trial court was of the opinion that the holder of the note could entirely disregard the relation of suretyship alleged by the defendant, and could relinquish and dissipate securities held without affecting its rights against the defendant. From the facts which later appeared during the trial, I am of the opinion that this ruling prevented the defendant from hav-

ing a fair trial. Strictly speaking, the defendant Johnson, in his answer, did not counterclaim for damages based upon the dissipation of securities; but he did set up the dissipation as a matter of defense. It appears that the defendant was more or less in the dark as to the actual handling of securities by the plaintiff, and would necessarily remain so until the testimony of Dinehart would be secured. Under the court's ruling, it would have been useless for the defendant to have attempted to amend his answer to conform to the proof, in support of a counterclaim for damages such as is amply warranted by the testimony of Dinehart. It clearly appears that the bank held, as security for Edwards's indebtedness to it, title to the lands sold to Rumley, and that it so dealt with the title as to allow the record title to appear in the name of Rumley, without getting into its own possession Rumley's note, which, in reality, represents the equity of Edwards. On this record, prima facie, the damage occasioned to Johnson by the failure of the bank to realize on this security amounts to more than is due the plaintiff on the notes in suit.

CHRISTIANSON, Ch. J. (dissenting). The majority opinion is based upon the premise that the plaintiff received from the defendant Edwards, "either as an absolute payment or as collateral," a \$1,600 note, secured by mortgage on an 80-acre tract of land in Pierce county in this state. A careful reading of the evidence leads me to the conclusion that the premise does not, in fact, exist.

The note involved in this suit bears date June 30, 1914. The defendant Johnson does not contend that he understood that the note was accompanied by any collateral, or that the bank should later receive any collateral.

The \$1,600 Rumley note and mortgage bear date April 21, 1917. The evidence shows that the defendant Edwards took these papers and a \$4,000 mortgage on other lands, and submitted them in person to Dinehart, the president of the plaintiff bank, on May 28, 1917. In looking them over he (Dinehart) discovered that there was a discrepancy between the principal \$1,600 note, and the interest coupons attached thereto. Dinehart, in his testimony, gives the following version of the transaction: "Edwards turned over the mortgage on that (80 acres in Pierce county) for \$1,600 on the 28th of May. I looked

over the note, the coupons attached, and the mortgage read 5 per cent and the coupons called for \$80 each, and, says I, 'You made a mistake here,' and he looked it over and says: 'I am going down to Illinois, and I will have that note and coupons corrected;' and he took the note, and I have never seen it since." The mortgage securing the \$1,600 note, the assignment of the mortgage, and the abstract of title, were left with Dinehart. Dinehart says that at that time he agreed with Edwards that the bank would take the two mortgages, if it found that the mortgagor "was good." It is undisputed that the \$1,600 note has never been returned, although the plaintiff bank has repeatedly written Edwards in regard thereto. The only evidence relating to the \$1,600 note and mortgage is the testimony of Dinehart. And if there is any basis for the holding of the majority it must be found in his testimony.

In this connection it may be mentioned that the defendant Edwards testified by deposition. And it is significant that he claims no credit for the \$1,600 note. He does, however, claim that the note involved in this suit has been, or should have been, paid, by the proceeds of some other notes.

I quote from his testimony:

Q. On or about the 15th day of July, 1917, did you have any conversation with Mr. C. E. Dinehart with reference to this note in controversy?

A. Yes. . . .

Q. State what that conversation was, to the best of your recollection.

A. To the best of my recollection it was that I wanted him to take some other notes that I had secured by mortgage and signed by Chas. and Wm. Anderson, amounting to about \$7,000 to be applied partly to pay the balance of the two Johnson notes, balance to be paid to the First National Bank of Rolette, North Dakota, to pay off certain notes to which they held the Anderson notes as collateral security. Mr. Dinehart, at that time, said he would look up the Anderson notes, and if they were satisfactory they would take them and apply the proceeds in that way.

Q. At the time you had the above conversation with Mr. Dinehart there was only a balance due on those two Johnson notes, and did I

understand from your testimony that these Anderson notes were, if accepted by Mr. Dinehart, to pay those two Johnson notes in full?

A. Yes.

Q. Are you indebted in any sum whatever to Mr. Dinehart or the State Bank of Slayton, the plaintiff herein, or either of them on account of the two Johnson notes in controversy?

A. I am not.

Q. Have you paid those two notes in full?

A. I have, not in currency, but by the Anderson notes, and in accordance with the agreement with Mr. Dinehart, which I have testified about before.

Dinehart denied the arrangement testified to by Edwards, and claimed that the plaintiff had applied the proceeds of the Anderson notes in accordance with the understanding which he and Edwards had relative thereto. The trial court submitted to the jury the question whether the proceeds of the Anderson notes should have been applied as claimed by Edwards, and the jury found in favor of the plaintiff upon this question.

Hence, the statement in the principal majority opinion, that "evidently the Rumley note and mortgage were given to apply on the note in suit, either as absolute payment or as collateral," is contrary to the testimony of both Dinehart and Edwards.

The majority opinion makes reference to the transfer by Edwards to the bank of 441.60 acres of land. The evidence shows that Edwards had sold this land to a man named Linson. Later Linson turned the land back to Edwards. There were first mortgages against the land, aggregating large amounts. Apparently Edwards was in no position to take care of the payments, so he turned over to the plaintiff bank a second mortgage upon, and a deed for, the land, with the understanding that the bank would pay the interest and taxes, etc., until the land could be sold. The undisputed evidence shows that the bank paid over \$8,800 to take up the first mortgages, interest payments, and taxes. This transaction originated subsequent to the execution of the note in suit, and so far as the record shows had no connection whatever therewith. There is not a scintilla of evidence tending to show that the land was to be held as collateral to the note in suit. The evidence shows that Edwards sold all of the land so transferred to the plaintiff; and

that the plaintiff, in accordance with Edwards's directions, executed deeds to the various purchasers, and gave full and proper credit for all proceeds of such sales.

Manifestly, *Scandinavian American Bank v. Westby*, 41 N. D. 276, 172 N. W. 666, does not sustain the holding that the plaintiff bank is liable for the \$1,600 Rumley note, either as purchaser or as the holder of collateral. In the case cited, Westby signed a note for one Stafne, "with the absolute understanding that the \$2,000 stock in the Citizens' State Bank of Alexander would continue to be held by the plaintiff as collateral security, as well as with the assurances by Mr. Hagan [the president of the payee bank] that such stock furnished ample security for the payment of the indebtedness." 172 N. W. 674. Thereafter the Scandinavian American Bank, in violation of its agreement with Westby, delivered the bank stock to a party, who converted it. When the bank sued Westby upon the note, he counterclaimed for the damages which he claimed to have sustained by reason of the bank's breach of contract. In this case no such condition exists. The defendant Johnson has interposed no counterclaim. His answer makes no specific reference to the Rumley note,—although there is an averment, upon information and belief, "that the said plaintiff has collected many promissory notes given as collateral to the promissory note described in the complaint, the proceeds of which have not been properly applied by said plaintiff, and for which no credit has been given these defendants, and that if proper credits had been applied on the herein-described note it would be discharged and paid in full." The note involved in this suit was made almost three years before the Rumley note and mortgage came into existence. The Rumley note was never, in fact, delivered to the plaintiff bank. During the negotiations between the president of the bank and Edwards regarding the purchase of this note, the defect or irregularity was discovered, and the note was turned over to Edwards. It had not become the property of the bank. Nor had it been delivered as collateral to the note in suit. It is undisputed that Edwards has never returned the note to the bank. So far as anyone knows he may have negotiated it elsewhere. The evidence shows that, after the bank satisfied itself that the \$1,600 note was good, it has stood ready to purchase and pay for the same, and would have done so at any time the note had been turned over to it.

Clearly the plaintiff bank should not be held liable as a purchaser and required to pay for the Rumley note. Nor should it be held liable on the theory that the note was held as collateral security to the note in suit, and that the plaintiff bank has violated some obligation which it owned to the defendant as regards such security. I believe that the trial court was entirely correct in instructing the jury that, in determining the case, they must not take into consideration, or base their verdict upon, the \$1,600 Rumley note.

FRANK LA DUKE, Respondent, v. A. A. MELIN, Julius Jabs, and
R. S. Williams, as the Board of Directors of Fort Totten School
District No. 30, a Public Corporation, Appellants.

(177 N. W. 673.)

Schools and school districts — school district appearing in contest and stipulating facts for determination on the merits could not claim on appeal that plaintiff chose wrong remedy.

In this case an election was held for the selection of a schoolhouse site in Fort Totten school district No. 30 in Benson county. One site received fifty-one votes, and another site received twenty-two votes. The election board refused to count the fifty-one votes, on the ground that the site designated by them was within the boundaries of the Fort Totten military reservation (also, that thirty of such fifty-one votes were cast by persons residing within said military reservation), and declared that the site designated by the twenty-two voters was the site chosen at such election. La Duke, a taxpayer and elector in such school district, instituted an election contest. He caused notice of contest, setting forth fully the grounds on which he assailed the findings of the election board, to be served on the proper parties. Such parties appeared and answered on the merits. Later the plaintiff and defendants entered into a stipulation of facts, and submitted the matter to the district court for determination on the merits. No objection was made in the trial court to the procedure adopted.

It is held:—

1. That the defendants cannot raise the question in the supreme court that plaintiff has chosen the wrong remedy.

United States — Fort Totten Military Reservation held no longer within exclusive control of United States.

2. That the Fort Totten Military Reservation has been abolished by the Federal government, and that the lands formerly included therein are no longer within the exclusive governmental and political control of the United States.

Indians — state may exercise political and governmental control over lands formerly within Fort Totten military reservation.

3. That the state may rightfully exercise political and governmental control over lands, formerly within such military reservation, and reserved by the United States for Indian school and Indian agency purposes, to the extent of including them within its political subdivisions for political and governmental purposes.

Schools and school districts — persons residing in former Fort Totten Military Reservation may vote at school election in which lands are included.

4. That persons residing on the lands so reserved, and otherwise qualified to vote, are entitled to vote at an election in the school district in which such lands are included.

Schools and school districts — schoolhouse site located on land in former military reservation included in district may be selected by voters.

5. That a schoolhouse site located on such lands is within the school district, and may be legally selected by the voters of the district.

Opinion filed April 2, 1920. Rehearing denied April 29, 1920.

From a judgment of the District Court of Benson County, *Burr, J.*, defendants appeal.

Affirmed.

W. M. Anderson and H. S. Blood, for appellants.

Wardrobe & Butterwick, for respondent.

CHRISTIANSON, Ch. J. This controversy involves the selection of a schoolhouse site in Fort Totten school district No. 30, in Benson county, in this state. The matter was submitted to the district court upon stipulated facts. From the stipulated facts it appears that the territory which was embraced within the Fort Totten military reservation is wholly within the boundaries of the school district; that at the election to select the schoolhouse site fifty-one ballots were cast for a site situated on land which formed a part of such military reservation, and twenty-five ballots were cast for a site on land within the school district, but outside of such military reservation; that thirty of the fifty

one votes cast for the site located on land within said military reservation were cast by persons who, at the time of such election, resided upon territory which formed a part of said military reservation. The election board rejected all ballots cast for the site located within the boundaries of the military reservation, and in its return certified that the site located outside of such boundaries had received a majority of all the legal votes cast at said election. Thereupon the plaintiff, who is a duly qualified elector and taxpayer in said school district and a patron of the public schools thereof, instituted a contest. The defendants, members of the board of directors of said defendant school district, appeared and answered. The parties thereupon submitted the matter to the district court for determination upon a stipulated statement of facts. The district court held that the election board erred in rejecting the ballots cast for the site situated within the military reservation; and that such site had received a majority of the legal votes cast at the election. Judgment was entered accordingly, and defendants have appealed.

Appellants contend:—

- (1) That a contest will not lie in a case like the one at bar.
 - (2) That persons who reside upon the Fort Totten Military Reservation are not electors under the laws of this state.
 - (3) That the proposed schoolhouse site within the Fort Totten military reservation is not in fact within the school district.
- (1) We do not find it necessary in this case to determine whether a contest will lie as to an election for the selection of a schoolhouse site. The district court is a court of general jurisdiction. Manifestly it was the tribunal in which any proceeding to set aside the findings of the election board must be instituted. The plaintiff caused notice of contest to be served upon the defendants. The defendants appeared and answered. Thereafter the parties entered into a stipulation of facts, which they submitted to the trial court, and asked that court to determine the questions of law arising upon the facts so stipulated. Hence, the trial court had jurisdiction of both the parties and the subject-matter. So far as the record shows, no objection was made, in any manner in the court below, to the form of the remedy. It is well settled that in these circumstances the defendants cannot now raise the question that the plaintiff should have pursued another remedy. *Lobe v.*

Bartaschawich, 37 N. D. 572, 164 N. W. 276; Minneapolis, St. P. & S. Ste. M. R. Co. v. Stutsman, 31 N. D. 597, 154 N. W. 654; 3 C. J. 723, 750.

(2) The land constituting the Fort Totten military reservation was part of the territory acquired in 1803 by cession from France. The military reservation was created by executive order in 1867. The Devils Lake Indian reservation, which was created the same year, included the military reservation within its outer boundaries. Later certain changes were made in the boundaries of the military reservation, the last change being made in 1887. The military reservation, as so defined, contained 9,000 acres. During all of this time the reservation was within the territory of Dakota, and the jurisdiction of the United States was necessarily paramount. In 1889, Congress provided "for the division of Dakota into two states and to enable the people of North Dakota, South Dakota . . . to form Constitutions and state governments, and to be admitted into the Union on an equal footing with the original states." [25 Stat. at L. 676, chap. 180.] See Enabling Act. No provision was made in such act of Congress for the retention by the United States of political authority, dominion, and legislative power over any of the so-called military reservations. The Constitution of North Dakota, however, provided: "Jurisdiction is ceded to the United States over the military reservations of Fort Abraham, Lincoln, Fort Buford, Fort Pembina, and Fort Totten, heretofore declared by the President of the United States; provided, legal process, civil and criminal, of this state, shall extend over such reservations in all cases in which exclusive jurisdiction is not vested in the United States, or of crimes not committed within the limits of such reservations. N. D. Const. § 204.

There is nothing to show that any application was made by the United States for such constitutional provision, but, as it conferred a benefit, the acceptance thereof is to be presumed in the absence of any dissent on their part. Fort Leavenworth R. Co. v. Lowe, 114 U. S. 525, 529, 29 L. ed. 264, 265, 5 Sup. Ct. Rep. 995.

It appears that the Fort Totten military reservation ceased to be used for military purposes by the War Department in 1882, and has not since been so used. It further appears that the Secretary of War, by an order issued October 1, 1890, placed the abandoned barracks and

other buildings at the disposal of the Secretary of the Interior for Indian school purposes; and that ever since that time the Secretary of the Interior, through the Bureau of Indian affairs, has had full control over such buildings, and that the same have been utilized for the purpose of conducting an Indian school therein.

In 1901 the Indians made a treaty with the United States, by the terms of which they did "cede, surrender, grant and convey to the United States all their claim, right, title, and interest in and to all that part of the Devils Lake Indian Reservation now remaining unallotted, including the tract of land at present known as the Fort Totten military reserve, situated within the boundaries of the said Devils Lake Indian reservation, and being a part thereof." [33 Stat. at L. 319, chap. 1620.] By act of Congress, approved April 27, 1904, such treaty was modified and amended, and accepted and ratified as amended, and provision made to carry the same into effect.

In § 4 of the act it was provided "that the lands ceded to the United States under said agreement, including the Fort Totten *abandoned* military reservation, which are exclusive of 6,160 acres which are required for allotments, excepting sections 16 and 36 or an equivalent of two sections in each township, and such tracts as may be reserved by the President as hereinafter provided shall be disposed of under the general provisions of the homestead and town-site laws of the United States, and shall be opened to settlement and entry by proclamation of the President. . . . The President is also authorized to reserve a tract embracing Sullys Hill, in the northeastern portion of the *abandoned* military reservation, about 960 acres, as a public park." [33 Stat. at L. 322, chap. 1620.]

And in § 5 it was provided "that sections 16 and 36 of the land hereby acquired in each township shall not be subject to entry, but shall be reserved for the use of the common schools and paid for by the United States at \$3.25 per acre, and the same are hereby granted to the state of North Dakota for such purpose; and in case any of said sections, or parts thereof, of the land in the said Devils Lake Indian reservation or Fort Totten *abandoned* military reservation should be lost to said state of North Dakota by reason of allotments thereof to any Indian or Indians now holding the same, or otherwise, the governor of said state, with the approval of the Secretary of the Interior, is hereby authorized to

locate other lands not occupied, in the townships where said lands were lost. . . ."

On June 2, 1904, the President issued his proclamation opening the lands for settlement in conformity with the provisions of the act of Congress. In the President's proclamation the lands so ceded by the Indians were declared to "be opened to entry and settlement and disposition under the general provisions of the homestead and town-site laws of the United States," except certain tracts (specifically described in the proclamation) which were reserved respectively for the Fort Totten Indian school, for agency purposes, for Sully's Hill Park, and for various churches and missions.

It has been noted that by the Enabling Act North Dakota was admitted as a state into the Union, "on an equal footing with the original thirteen states in all respects whatever." There was no reservation of sovereignty over any part of the public lands. Nor was there any provision in any prior treaty with the Indians, to the effect that the lands within the reservation should not be included within a state or territorial jurisdiction without the assent of the Indians. *Langford v. Monteith*, 102 U. S. 145, 26 L. ed. 53. Section 204 of the state Constitution recognized this condition. The cession of jurisdiction made in that section was, of course, made for the purpose such cessions are generally made, and it was accompanied by the conditions which are generally implied. It has been said by the highest authority that such cessions are "necessarily temporary, to be exercised only so long as the places continue to be used for the public purposes for which the property was acquired or reserved from sale. When they cease to be thus used, jurisdiction reverts to the state." *Ft. Leavenworth R. Co. v. Lowe*, 114 U. S. 525, 540, 29 L. ed. 264, 270, 5 Sup. Ct. Rep. 995; see also *McCrary, Elections*, 4th ed. p. 69. It will be noted that § 204 refers to four different military reservations. The other three military reservations have long since been abandoned, and the lands included therein become the property of private owners. It also seems obvious that the Fort Totten military reservation has ceased to exist. Congress referred to it as "the *abandoned* military reservation," and provided that the lands included therein (except such tracts as might be reserved by the President for stated purposes) "*shall be disposed of under the general provisions of the homestead and town-site laws of the*

United States." And by an act approved June 30, 1919, Congress "authorized and directed" the Secretary of the Interior "to sell and convey . . . to the public school district in which the land is situated," the site involved in this case, for which the fifty-one votes were cast.

The land reserved by the President for the Fort Totten Indian school was not reserved for any military purpose, but for a wholly different one. The United States held the property for the purpose for which it was reserved in the President's proclamation, and not for the purpose for which jurisdiction was ceded under § 204 of the state Constitution. Even if such lands be deemed part of an Indian reservation, the property of persons other than Indians situated thereon might be subjected to taxation by the laws of this state. *Maricopa & P. R. Co. v. Arizona*, 156 U. S. 347, 39 L. ed. 447, 15 Sup. Ct. Rep. 391; *Thomas v. Gay*, 169 U. S. 264, 42 L. ed. 740, 18 Sup. Ct. Rep. 340; *Utah & N. R. Co. v. Fisher*, 116 U. S. 28, 29 L. ed. 542, 6 Sup. Ct. Rep. 246; *Wagoner v. Evans*, 170 U. S. 588, 591, 42 L. ed. 1154, 1156, 18 Sup. Ct. Rep. 730; see also *Montana Catholic Missions v. Missoula County*, 200 U. S. 118, 50 L. ed. 398, 26 Sup. Ct. Rep. 197. And under the rule announced by this court in *State ex rel. Tompton v. Denoyer*, 6 N. D. 586, 72 N. W. 1014, and reaffirmed in *State ex rel. Baker v. Mountrail County*, 28 N. D. 389, 149 N. W. 120, persons resident thereon, possessing the qualifications of electors in this state, are entitled to vote, and it is the duty of the proper authorities to afford them an opportunity to do so. See also *Hankey v. Bowman*, 82 Minn. 328, 84 N. W. 1002; *McCrary, Elections*, 4th ed. p. 69.

We are of the opinion that the Fort Totten military reservation has ceased to exist; that the state may rightfully exercise political and governmental jurisdiction over the lands reserved for Indian school and Indian agency purposes, to the extent of including such territory within its political subdivisions for political and governmental purposes; and that, hence, persons residing on such lands, possessing the qualifications of electors, are legal voters in the political subdivision in which such lands are included.

In this case it was stipulated, and the trial court found, that all of the persons whose ballots were disregarded by the election board possessed all the qualifications of electors and were entitled to vote at said

election, "unless excluded therefrom" by reason of the fact that they were residing on lands within the boundaries of the so-called Fort Totten Military Reservation. It follows from what has been said above that the election board erred in disregarding such ballots, and that the trial court was correct in holding that they must be counted.

(3) The contention that the site selected is outside of the school district is disposed of by what has been said above. But it is pointed out that in the act authorizing the Secretary of the Interior to sell and convey the site to the school district, it was "*provided* that Indian children shall be permitted to attend any school established thereon on an equality with white children." And it is contended that the school district may not accept the site with the condition attached. Even though the school district could not accept the condition that would not invalidate the election. Manifestly, title to a site cannot be obtained until after it has been selected, and if, for any reason, it should become impossible to obtain title to a site chosen, certainly that would not result in the selection of a site which had received a lesser number of votes. In such case, of course, it would be essential to hold another election. We do not, however, construe the proviso of the act of Congress as appellants contend that it should be construed. We do not believe that there was any intention on the part of Congress to place upon the school district the duty of educating Indian children, wards of the nation, who are now attending the Indian school. In our opinion the intention of Congress was merely to provide that Indian children residing within the school district, and otherwise entitled to attend school within the district, should be permitted to do so "on an equality with white children." Such provision was doubtless inserted through an abundance of caution. It added nothing to the obligations of the district or the rights of such children. For the enabling act and the state Constitution both provide "for the establishment and maintenance of a system of public schools which shall be open to all children" of the state of North Dakota. Enabling Act, § 4, Const. § 147.

It follows from what has been said that the judgment appealed from must be affirmed. It is so ordered.

BIRDZELL, ROBINSON, and BRONSON, JJ., concur.

GRACE, J., concurs in the result.

STATE OF NORTH DAKOTA EX REL. WM. LANGER, Attorney General, Respondent, v. O. E. LOFTHUS, as State Examiner, and H. O. Paulson, Appellants.

(177 N. W. 755.)

Officers—public policy requires that offices be filled and duties thereof be discharged.

In an action brought by the state, on relation of the attorney general, where the complaint alleged that one of the defendants had been appointed deputy bank examiner under § 5146, Comp. Laws 1913, and that his appointment had not been approved by the state banking board, but, on the contrary, had been affirmatively disapproved; and where the only relief sought was injunctive in character, the granting of which would result in the creation of a vacancy in the office of deputy state examiner, it is held:

1. Public offices exist for the public benefit, and the public policy of the state requires that they be filled and the duties thereof discharged.

Officers—deputy bank examiner will not be enjoined from acting as such in the absence of necessity.

2. In the absence of allegations showing the necessity of averting some threatened injury to the public or other interests directly affected, an injunction will not be granted to prevent one who is acting as deputy examiner, with the consent of the public examiner, from performing the duties incident to such deputyship.

Officers—injunction to prevent officer from acting will not lie where superior claim not shown.

3. Where no superior claim is made to the office of deputy examiner, and where no specific injury, either existing or threatened, is alleged, the complaint does not present a case appealing to the extraordinary legal or equitable powers of the court.

Opinion filed May 1, 1920.

Appeal from District Court, Burleigh County, *Nuessle, J.*
Reversed.

Foster & Baker, for appellants.

An injunction cannot be granted to prevent the exercise of a public or private office in a lawful manner by the person in possession. Comp. Laws 1913, § 7214; 22 R. C. L. 454, § 113; 691, § 17; 29 Cyc. 1416 B; 4 Pom. Eq. Jur. 4th ed. §§ 1756, 1757-1760.

As equity deals with property rights alone, an injunction will not

issue to restrain political acts of public officers. 4 Pom. Eq. Jur. 4th ed. § 1746; *Georgia v. Stanton*, 6 Wall. 50, 18 L. ed. 721; *Tupper v. Dart*, 104 Ga. 179, 30 S. E. 624; *State v. Gibbs*, 13 Fla. 55, 7 Am. Rep. 233; *Hardesty v. Taft*, 23 Md. 513, 87 Am. Dec. 584; *Melody v. Goodrich*, 35 Misc. 138, 70 N. Y. Supp. 568.

"An injunction will not issue to restrain de facto public officers from performing certain acts, on the ground that they are powerless because not legally qualified." 4 Pom. Eq. Jur. 4th ed. § 1761, citing *Graeff v. Felix*, 200 Pa. 137, 49 Atl. 758; *Hardesty v. Taft*, 23 Md. 513, 87 Am. Dec. 584; *School Dist. v. Wolf*, 78 Kan. 805, 20 L.R.A. (N.S.) 358, 98 Pac. 237; *Hotchkiss v. Keck*, 84 Neb. 545, 121 N. W. 579; *State v. Armstrong*, 27 Okla. 810, 117 Pac. 332.

Title to office and the right to act as an officer cannot be questioned by the writ of prohibition. 22 R. C. L. 17, § 15; *Swart v. Groughton*, 35 Hun, 281; *Mathot v. Triebel*, 102 App. Div. 426, 92 N. Y. Supp. 512; *Cozzens v. American Engineering Co.* 55 Misc. 393, 106 N. Y. Supp. 548.

It is a hard and fast rule that quo warranto will not issue in disputes concerning offices at will. To justify the employment of quo warranto to try title to office, it is essential that the tenure of the office be certain. 23 Cyc. 1412A; 22 R. C. L. 656, § 1; *Ames v. Kansas*, 111 U. S. 449, 28 L. ed. 482, 4 Sup. Ct. Rep. 437; *Darley v. Reg.* 12 Clark & F. 520, 541, 8 Eng. Reprint, 1513, 1521, 1522; *High Extr. Leg. Rem.* 2d ed. 493, § 626.

Quo warranto lies for usurping any office, whether created by charter of the Crown alone, or by the Crown with the consent of Parliament, provided the office be of a public nature, and a substantive office, and not merely the function or employment of a deputy or servant held at the will or pleasure of others. *Atty. Gen. ex rel. Adams v. McCaughey*, 21 R. I. 344, 43 Atl. 348; *State ex rel. Gruber v. Champlin*, 2 Bail. (S. C.) 220; *High, Extr. Leg. Rem.* 2d ed. 554, § 695, citing *Bradley v. Sylvester*, 25 L. T. N. S. 459; 24 *Harvard L. Rev.* 314 citing *Bradley v. Sylvester*, 25 L. T. N. S. 459; *Reg. v. Bayley* [1898] 2 Ir. R. 335.

It is well settled that quo warranto will not lie when the causes of removal are prescribed by statute, if the statute also prescribed a special mode of removal which is adequate to the purpose. *Wishek v. Becker*, 10 N. D. 63, 79, 84 N. W. 594; *Comp. Laws* 1913, § 5146.

William Langer, Attorney General, and *Albert E. Sheets, Jr.*, Assistant Attorney General, for respondent.

To be duly appointed, deputy examiners must receive the approval of the state banking board, N. D. Comp. Laws 1913, § 5146, ¶ 6.

As to whether the deputy bank examiner is officer or employee. *United States v. Morris*, 2 Brock, 103; *Bunn v. People*, 45 Ill. 397; *State v. Jennings*, 63 Am. St. Rep. 723, 49 N. E. 404; *State v. Brooms*, 38 Atl. 841; *State v. Stanley*, 66 N. D. 59, 8 Am. Rep. 488.

The investiture of any state position which determines the character more than another, it is whether or not it carries with it, in the administration of its duties, the exercise of the prerogatives and sovereignty of the state. *Mechem*, Pub. Off. § 4; *Miller v. Supervisors*, 25 Cal. 98; *Com. v. Swasey*, 133 Mass. 538; *Bunn v. People*, 45 Ill. 397; *United States v. Mouat*, 124 U. S. 303; *Walker v. Cincinnati*, 24 Am. St. Rep. 14, 8 Am. Rep. 24; *McArthur v. Nelson*, 81 Ky. 67.

A person appointed to office under statutory provision that appointment be made with approval of some board must be approved as required before a person is legally entitled to the office. *Thropp*, Pub. Off. § 103; *People v. Bissell*, 49 Cal. 407; *State v. Williams*, 222 Mo. 268; see extended note in 17 Ann. Cas. 1011; *State v. Bryson*, 44 Ohio St. 457, 8 N. E. 470; *Com. v. Allen*, 128 Mass. 308.

BIRDZELL, J. This is an appeal from an order overruling separate demurrers of the defendants to an amended complaint. The defendant Lofthus is state examiner of North Dakota, and on October 28, 1919, he appointed the defendant Paulson a deputy examiner. The latter immediately signed an oath of office as required by law, and commenced the performance of duties as a deputy examiner. On October 30, 1919, the matter of this appointment was taken up at a meeting of the state banking board, composed of the governor, the secretary of state, and the attorney general. From the minutes of this board meeting it appears that the attorney general moved that the appointment of Mr. Paulson be not approved, the motion being carried by the affirmative vote of the attorney general and the secretary of state, the governor voting, "No". The secretary of state stated a reason for his vote, which did not go to the qualifications or fitness of the defendant Paulson for the position,

but which was in the nature of a protest over the removal of his predecessor, Halldorson. The complaint sets up the foregoing, and, in addition, alleges that the banking board has persisted in its disapproval of the appointment; that Paulson, since October 28, 1919, has continuously exercised the duties and powers of a deputy state examiner to the extent of examining banks and other moneyed corporations; for which he is attempting to collect the salary attaching to the office of deputy state examiner, and the expenses incurred in the discharge of the duties incident thereto. It is not alleged that any such salary or expenses have been paid or are likely to be paid. Plaintiff further alleges that the question raised "is a matter affecting the interests of the people of the state, and the dignity, the integrity, and independence of the laws and Constitution of the state." The prayer for relief is for "a writ of prohibition and injunction," (1) prohibiting and restraining the defendant Lofthus from continuing to permit the defendant Paulson to act as a deputy bank examiner; (2) prohibiting and enjoining Paulson from continuing to exercise any of the powers or perform any of the duties incident to the office of deputy state examiner; and (3) for general relief.

In the district court an alternative writ of injunction issued substantially in accordance with the prayer for relief above referred to, and, upon the adjourned return day of the order to show cause, the matter was heard upon separate demurrers to the complaint, whereupon the application for the injunctive order was vacated, but the demurrers to the complaint were overruled. The appeal is only from that portion of the order overruling the demurrers.

The sole question is as to the sufficiency of the complaint to warrant the granting of any relief.

The appointment in question was made under ¶ 6 of § 5146, Comp. Laws 1913. The statute reads in part as follows: "The state examiner may, subject to the approval of the state banking board, appoint and at pleasure remove, not more than ten (10) deputy examiners and one stenographer and such other employees as may, in the judgment of the state banking board, be necessary for the proper discharge of the business of his department."

The deputy examiners are required to give bond in the sum of \$10,000. It is asserted that deputy examiners, whose appointment is

provided for in the manner indicated, are not officers within § 7969, Comp. Laws 1913, which provides for a civil action as a substitute for the remedies formerly attainable by the writ of quo warranto and by proceedings in the nature of quo warranto. Section 7971 provides that the state may commence an action against the offending party when any person "shall usurp, intrude into, or unlawfully hold or exercise any public office."

The principal contention of the appellant is that a deputy examiner does not occupy an office capable of being judicially protected against intrusion under this statute. It is pointed out that the tenure is at the will of the appointing power, and that no cause need be assigned for the removal of any such deputy. This being true, it would seem that no question concerning the right of an intruder could arise which could not be determined by the administrative or executive officers who are charged with the appointment; for it is apparent that they, acting harmoniously, can vest and divest the right to the position of deputy examiner at will, so long as they keep within the number limited by the statute.

The complaint discloses, however, that the members of the state banking board are not acting harmoniously in the instant case. Whether, from a failure of the board members to agree upon an appointment, or from the placing by them of conflicting constructions upon the statute providing for their duties, does not appear, if, indeed, it is material. Conceding that this situation might possibly give rise to a controversy properly determinable in a court of justice, we do not regard the facts stated in the complaint in this case as being sufficient for the purpose. Neither, in our view, is its sufficiency properly tested by the considerations advanced by the appellant, as noted above. We shall, therefore, not concern ourselves with a decision upon the contentions advanced; for, wholly apart from the question as to whether or not the state may maintain a civil action to oust an intruder from an appointive office, terminable at the will of the appointing power, we are satisfied that the complaint in the instant case does not state facts sufficient to warrant judicial interference.

This proceeding is apparently not brought for the purpose of testing the title of the defendant Paulson as against the claim of any other person. It would seem that the whole object of the proceeding is to obtain

a judicial determination of the fact that the defendant Paulson has no title to the office. If any of the relief prayed for be granted, it would merely result in creating a vacancy. Public offices are created for the benefit of the public, and these benefits can only be secured when the offices are occupied and the duties thereof discharged. The public policy in this respect is well expressed in § 111 of the Compiled Laws of 1913, where the duty is imposed upon the governor "to see that all offices are filled and the duties thereof performed, or, in default thereof, to apply such remedies as the law allows." And, "if the remedy is imperfect, acquaint the legislative assembly therewith at its next session."

If affirmatively appears in the complaint that the defendant Paulson is discharging the duties of deputy examiner, and there are no allegations from which it would appear that the interests of the state are jeopardized, or that any injury will result to anyone from the manner in which these duties are being performed. Neither does the plaintiff seek to compel the taking of any steps that might be necessary to effect a legal appointment to the office in question. We are of the opinion that the complaint does not state facts sufficient to invoke either the equitable or the extraordinary legal powers of the court.

For the foregoing reasons the order appealed from is reversed.

CHRISTIANSON, Ch. J., and ROBINSON and BRONSON, JJ., concur.

GRACE, J. I concur in the result.

WILLIAM SOLON and Abe Solon, Copartners under the Firm Name and Style of Universal Electrical Appliance Company, Plaintiffs and Appellants, v. A. J. O'SHEA, Defendant and Respondent, and FARGO NATIONAL BANK, a Corporation, Garnishee.

(177 N. W. 757.)

Appeal and error — appeal from order vacating garnishment must present record identifying papers or evidence presented.

1. In an appeal from an order vacating garnishment proceedings, made

a motion and order to show cause therefor, the appellant, pursuant to the statutes and the rule of this court, must present a record identifying by the order or certificate of the trial court, the papers or evidence presented or heard upon the hearing.

Garnishment—failure to serve garnishee summons on defendant renders service on garnishee null.

2. (Upon reinstatement of appeal.) Failure to serve a garnishee summons upon a defendant or his attorney pursuant to the statute renders service on the garnishee null, void, and of no effect from the beginning, and it is unnecessary, in such event, to serve or file any formal notice of dismissal.

Opinion filed May 1, 1920.

Appeal from District Court, Cass County, *Cole, J.*

From an order vacating certain garnishment proceedings, appeal dismissed; thereafter, appeal reinstated upon petition for remand and certification of the record.

Order reversed.

John G. Pfeffer, for appellants.

The proceedings against a garnishee are deemed an action by the plaintiff against the garnishee and against the defendant, as parties defendant, and all provisions of law relating to proceedings in civil actions at issue are applicable thereto. *Scott Co. v. Scheidt*, 35 N. D. 433, 160 N. W. 502; *Park, Grant & Morris v. Nordale*, 170 N. W. 555.

In all cases where the defendant claims the debt or property garnished to be exempt, such claim of exemption may be heard and determined by the court at any time after the claim is made, on three days' notice to the opposite party. Sess. Laws 1917, § 3, chap. 124.

Where the legislature has said that a certain act shall be done in a certain manner, such affirmative requirement will be deemed to include an implied negative that it shall not be done in another manner. *Park, Grant & Morris v. Nordale*, 170 N. W. 555.

"Unless the garnishee summons is so served on the defendant or his attorney in accordance with the provisions of this section, the service on the garnishee shall become null and void and of no effect from the beginning." Comp. Laws, 1913, § 7571.

The dismissal or discontinuance, in apt time, of a prior action, defeats a plea in abatement of the pendency of such action. 1 Cyc. 24 and cases cited.

"If the affidavit or process by which a suit was commenced is void, a plea of the pendency of such suit, in abatement of a subsequent suit, falls." *Ernst v. Hogue*, 86 Ala. 502, 5 So. 738; *Minniece v. Jeter*, 65 Ala. 222.

T. J. McEnroe, for respondent.

"Upon a proper showing to the court that a garnishment process has been improperly or improvidently issued, as where the necessary steps to give the court jurisdiction of the proceedings had not been taken, or where other statutory prerequisites have not been complied with, the garnishment proceedings will be dismissed." 20 Cyc. 1125, 1126.

The law applicable to the case at bar is found in the Compiled Laws of North Dakota for 1913, §§ 7571 and 7572; 20 Cyc. 1125.

The proper mode of procedure to vacate and dissolve proceedings in garnishment is either a motion to quash the proceedings or a rule to show cause why they should not be quashed, and some cases where fraud or surprise is alleged, a court of equity will intervene to protect the garnishee and defendant. 20 Cyc. 1126.

Appellants proceeded with a second garnishment for the same debt, in the same action, against the same garnishee, without first dismissing their first garnishment proceedings, which was fatal. *Rustadt v. Bishop* (Minn.) 50 L.R.A. 168, 83 N. W. 449; *Seiver v. Union P. R. Co.* (Neb.) 61 L.R.A. 319, 93 N. W. 943; *Milwaukee Bridge & Iron Works v. Brevoort Circuit Judge* (Mich.) 41 N. W. 215; *Nornberg v. Larson* (Minn.) 72 N. W. 564.

BRONSON, J. This is an appeal from an order of the district court vacating garnishment proceedings, upon a motion and order to show cause. The record presented to this court comprises the files, pleadings, and process on file in the office of the clerk of the district court in such action, together with the papers on appeal. To this record is attached only the certificate of the clerk, certifying that such papers constitute those on file of record in such action.

In the order of the district judge, vacating and setting aside the garnishment proceedings involved, and in his memorandum opinion, setting forth the reasons therefor, there is no recital stating, and in the record there is no certificate by the trial judge certifying what papers, affi-

davits, or evidence were presented or considered upon the hearing of such motion.

Briefly the facts are these:—

In September, 1918, the plaintiff instituted an action to recover an alleged balance for goods, wares, and merchandise sold. In July, 1919, garnishment process was served upon the garnishee herein. No service thereof was made upon the defendant. Subsequently, in September, 1919, new garnishment process was served upon the garnishee and the defendant. Pursuant thereto, the bank made disclosure of its indebtedness to the defendant.

Subsequently, in November, 1919, the motion and order to show cause, herein involved, was made to vacate and annul both of such garnishment proceedings, apparently upon grounds of jurisdiction, and, further, that such garnishment process was used for the improvident purpose of harassing the defendant. In dismissing the garnishment proceedings, the trial court determined that a notice of dismissal of the first garnishment should, among other things, have been given to the defendant before the second garnishment, and that there were other matters appearing, from the affidavits of the parties, that would sustain the court in vacating such garnishment proceedings.

It is apparent that appellate procedure must rest upon a record settled as the statute requires. What matters may have been considered by the trial court upon this hearing, what affidavits or even evidence was presented, not contained in this record, if any, is not disclosed. The statute requires, as well as the rule of this court, either that the order of the trial court describe the papers, or evidence upon which the same was made, or that a certificate to that effect be made. See §§ 7822, 7944, Comp. Laws, 1913, chap. 131, Laws 1913; Supreme Court Rule 24 [145 N. W. xiii]; *Harris v. Hessin*, 30 N. D. 33, 151 N. W. 4. Manifestly this court cannot review the order of the trial court upon this record. The appeal is dismissed, without costs.

CHRISTIANSON, Ch. J., and ROBINSON and BIRDZELL, JJ., concur.

GRACE, J. (dissenting). This is an appeal from an order of the district court, vacating garnishment proceedings, upon a motion and an order to show cause why the same should not be vacated.

The record in this case, presented to this court, contains the following papers and files:—

Summons, complaint, sheriff's return of service, the last garnishment summons, affidavit for garnishment, affidavit of service on the garnishee, sheriff's return, disclosure of garnishee, affidavit of E. T. Conmy, dismissal of garnishment, motion to vacate garnishment, affidavit of G. E. Nichols, affidavit of A. J. O'Shea, affidavit of T. H. McEnroe, order to show cause, sheriff's return, order vacating and canceling garnishment, with the court's memorandum attached, notice of appeal, assignment of error, and undertaking on appeal.

To this record is attached the certificate of the clerk of the district court, to the effect that the above-named papers constitute and comprise all the files, pleadings, and process, on file and of record in the above-entitled action, in his office; and that the notice of appeal, assignment of error, and undertaking on appeal, are the originals thereof.

The district judge, A. T. Cole, in making the order vacating and setting aside the garnishment proceedings, rendered a memorandum opinion, but did not therein, nor by his certificate, nor in the order, certify what papers, affidavits, or evidence were presented and considered by him when such motion was heard.

The material facts, concisely stated, are as follows: The plaintiff commenced an action, in September, 1918, to recover the balance claimed to be due him for merchandise sold the defendant.

In July, 1919, garnishment process was served upon the garnishee, but no service thereof was ever made upon the defendant.

In September, 1919, new garnishment process was served upon the garnishee and the defendant. The garnishee then made disclosure of its indebtedness to the defendant, amounting to \$460.24.

The defendant then made a motion for the vacation and cancelation of the garnishment proceedings, principally upon the ground that there was no notice served of the dismissal of the first garnishment proceeding, and attempted to support it by the affidavits of George E. Nichols, cashier of the Fargo National Bank, and upon his own affidavit and the affidavit of others.

The substance of Nichol's affidavit is to the effect that, on the 19th day of July, 1919, as an officer of the bank, he was served with garnishment proceedings; and that, on the 10th day of September, 1919, a

second garnishment was served upon the affiant, and that neither of said garnishments had, until the time of the making of the affidavit, been released.

The defendant's affidavit is to the effect that the first garnishment process was not served upon him, and that the second garnishment was served, on the 10th day of September, 1919, on the garnishee and the defendant.

The affiant further claims in his affidavit, that the garnishment proceedings are bad, and that the same were had for the purpose of interfering with his business, and harassing, intimidating, and enforcing him to pay an unjust debt.

The affidavit of defendant's attorney, T. H. McEnroe, to the effect that no garnishee summons or affidavit for garnishment were ever served upon him, and that the plaintiffs' attorney, during all the time, knew that McEnroe was the attorney for the defendant.

Section 7944, Comp. Laws, 1913, in substance, requires that when an appeal from an order of the district court is made, it shall, upon its face, by apt words, briefly describe the affidavits, documents, papers, and evidence upon which the order is made, and that the judges may, at their discretion, refuse to sign an order not so framed; and the supreme court may, at its discretion, dismiss any appeal from an order, which is not framed substantially in accordance with the requirements of this section.

Section 7822, in substance, requires the clerk of the district court, upon appeal from an order, to transmit the order appealed from, and the original papers used by each, upon the application for such order, or copies thereof, as directed therein.

He shall also transmit the original notice of appeal and undertaking. He shall annex to the papers transmitted, a certificate, under his hand and seal of the court from which the appeal is taken, certifying that they are the original papers, or copies, as the case may be, and that they are transmitted to the supreme court, pursuant to such appeal. There is no further certificate nor attestation necessary in appeal from an order.

If the appellant does not, within thirty days after his appeal is perfected, cause a proper record in the case to be transmitted to the supreme court, by the clerk of the district court, the respondent may cause such record to be transmitted by the clerk of the district court, to

the clerk of the supreme court, and, in such case, may recover the expense thereof, as costs, in case the order appealed from is, in whole or in part, affirmed.

The order of the trial court fails wholly to comply with the requirements of § 7944. The clerk's certificate may not wholly comply with § 7822.

The appellant, however, has not made any motion, in this court, for a dismissal of the appeal, upon either of these grounds, and while this court might, in its discretion, order dismissal for these reasons, such discretion should not be, we think, arbitrarily used, especially since the appeal is, at this time, fully submitted to the court.

If this court felt that it was absolutely necessary to a proper decision of this appeal, that the record should be perfected, in regard to the matters above mentioned, a better practice, it seems to us, would be to remand the case, and require the district judge and clerk of the district court to complete the record, by incorporating such papers as were presented on the hearing, which are required to be included in the order or the certificate. Thus requiring of them full performance of their duties, as pointed out to them so plainly by the sections above mentioned.

This suggestion, as to proper practice, is, we think, upheld by the decision in the case of *Harris v. Hessin*, 30 N. D. 33, 151 N. W. 4.

The only assignment of error is that the court erred in granting the motion of defendant, and in making its order vacating and canceling the garnishment proceedings.

It is so obvious that the making of such order is reversible error, that the matter scarcely needs discussion.

The first garnishment proceedings were absolutely void and of no effect. Hence, no necessity arose of serving a notice of dismissal thereof. See *Comp. Laws 1913*, § 7571.

The second garnishment proceedings were valid and legal, and the court had jurisdiction thereunder of the garnishee and defendant; and it having duly and legally acquired jurisdiction of them, the garnishment proceedings were thenceforth against the garnishee and the defendant, as parties defendant; it was thereafter an action against the garnishee, as well as defendant.

See *Comp. Laws 1913*, § 7581; *Park, Grant & Morris v. Nordale*, 41 N. D. 351, 170 N. W. 555.

BROWNSON, J. (upon reinstatement of the appeal). Upon the dismissal of this appeal pursuant to the opinion of the court, the appellants presented a petition to remand the record to the trial court for purposes of presenting a record as required, and for reinstatement of the appeal. This petition has been granted. The record was remanded, and is now before this court properly settled and certified. The cause accordingly is now presented for determination upon its merits. The facts are sufficiently recited in the formr opinon. The motion and order to show cause, presenting jurisdictional questions, was properly entertained. The statute prescribes, and this court has held, that unless the garnishee summons is also served on the defendant or his attorney the services of the garnishee becomes null and void. Comp. Laws 1913, § 7571; Park, Grant & Morris v. Nordale, 41 N. D. 351, 170 N. W. 556. In this case the first garnishee summons was not served on the defendant or his attorney. Such garnishment process accordingly became wholly ineffectual and void before the service of the second garnishment process. It was not necessary to serve or file a notice of dismissal of the first garnishment. It follows that the second garinshment served on both the garnishee and the defendant is valid and effective. No other grounds appear in the record or are stated by the court for the dismissal of the second garnishment. The trial court, accordingly, erred in dismissing such second garnishment. The order of the trial court is reversed in that regard, without costs to either party.

CHRISTIANSON, Ch. J., and GRACE, ROBINSON and BIRDZELL, JJ.,
concur.

M. R. MURPHY, Appellant, v. CHRIST WILHELMSON, Respondent.

(177 N. W. 753.)

Mortgages — evidence held insufficient to establish a cause of action for vacation of satisfaction and for foreclosure.

In an action to vacate a satisfaction of a mortgage, and to foreclose the mortgage, it is *held* that the trial court erred in granting a motion made at the
45 N. D.—24.

close of the plaintiff's case for a dismissal of the action on the ground that plaintiff had failed to establish his cause of action.

Opinion filed May 1, 1920.

From a judgment of the District Court of Traill County, *Cole, J.*, plaintiff appeals.

Reversed and remanded.

C. E. Leslie, for appellant.

"A discharge obtained by fraud or made through mistake may be canceled if other parties having no notice of the fraud have not, in the meantime, acquired an interest in the property." *Jones, Mortg.* 4th ed. ¶¶ 966, 966a, 967; *Martin v. De Ornelas*, 139 Cal. 41, 72 Pac. 440; *Harker v. Scudder*, 15 Colo. App. 69, 61 Pac. 197; *Reed v. Jennings*, 196 Ill. 472, 63 N. W. 1005; *Stiger v. Bent*, 111 Ill. 328; *Conly v. Dibber*, 91 Ind. 413; *Mallett v. Page*, 8 Ind. 362; *Whipple v. Fowler*, 41 Neb. 675, 60 N. W. 15; *Harris v. Cook*, 28 N. J. Eq. 345; *Kind v. McVicker*, 3 Sandf. Ch. 192; 2 Cyc. 1433.

A release of satisfaction entered by accident or inadvertence, so that it is not in accordance with the real intention of the party, may be set aside and the mortgage reinstated, although not to prejudice of third persons subsequently dealing with the property in good faith. *White v. Stevenson*, 144 Cal. 104, 77 Pac. 828; *Russell v. Mixer*, 42 Cal. 475; *Seymour v. Mackey*, 126 Ill. 341, 18 N. E. 552; *Henschel v. Mamero*, 120 Ill. 660, 12 N. E. 203; *Bowen v. Gilbert*, 122 Iowa, 448, 98 N. W. 273; *Bruse v. Nelson*, 35 Iowa, 157; *Southern Kansas Farm etc. Co. v. Garrity*, 57 Kan. 805, 48 Pac. 33; *Cobb v. Dyer*, 69 Me. 494; *Bond v. Dorsey*, 65 Md. 310, 4 Atl. 279; *Ferguson v. Glassford*, 68 Mich. 36, 35 N. W. 820.

I. A. Acker, for respondent.

"Not only may the allegations of a bill in equity be held to be defective where there is a lack of certainty, but such allegations must be direct and positive." 10 R. C. L. p. 414, § 169.

"The statement of the mere opinion in a complaint, unsupported by specific facts sufficient to show that the opinion in question is well grounded, is bad pleading." 10 R. C. L. p. 415, § 170; *DeWitt v. Hays*, 2 Cal. 463, 56 Am. Dec. 352.

CHRISTIANSON, Ch. J. This is an action to cancel a satisfaction of a mortgage, and to foreclose the mortgage. In his complaint the plaintiff alleges that the mortgage was executed and delivered on August 18, 1915, by one Charles P. Smith and Minnie E. Smith, his wife, to secure the payment of a certain promissory note for \$467.65, dated August 18, 1915, and payable October 1, 1915; that at the time of the execution and delivery thereof said Smith and wife were the owners of the land described in the mortgage; that the mortgage was recorded in the office of the register of deeds of Traill county on August 20, 1915; that no part of said mortgage indebtedness has been paid except \$90, paid in August, 1915; that on December 6, 1915, said Charles P. Smith and Minnie E. Smith, his wife, sold and conveyed all of said land to the defendant Christ Wilhelmson, by warranty deed, which was recorded in the office of the register of deeds of Traill county on March 24, 1916; that the defendant Karl L. Hjort was the agent and attorney of the defendant Wilhelmson in the purchase of said lands; that on June 2, 1916, said Hjort represented to the plaintiff that the mortgage held by him was about to be paid, and that the same would be paid in a day or so; that he (Hjort) needed a satisfaction of the same so that he could deliver it when payment was made; that thereupon plaintiff executed and delivered to said Hjort a satisfaction of the mortgage to be surrendered when the debt secured thereby was paid; that no part of the amount due was paid, but that said Hjort on June 2, 1916, caused said satisfaction to be recorded in the office of the register of deeds of Traill county. It is further averred that the defendant Karl L. Hjort was an attorney at law, residing and practising in the city of Hillsboro; that at the time he induced the plaintiff to execute said satisfaction of mortgage he was the state's attorney of said Traill county; that plaintiff executed and delivered said satisfaction to said Hjort by reason of the confidence in his integrity and honesty which he then possessed. It is further averred that said defendants, Wilhelmson and Hjort, were intimate friends. And, upon information and belief, it is alleged that they conspired together to procure the satisfaction, to the end that said defendant Christ Wilhelmson might avoid paying plaintiff's mortgage; and that said Hjort did procure said satisfaction and place the same of record in pursuance of said conspiracy. The defendant Wilhelmson alone was served. In his answer, he admit-

ted that he was the owner of the land, but denied that Hjort ever acted as his agent; and he averred that, on the contrary, Hjort acted as agent for Smith, and induced him (Wilhelmson) to purchase the lands from Smith. He denied the existence of any conspiracy between himself and Hjort. He further averred that plaintiff had made no demand for a cancelation of the satisfaction, and that he had never notified the defendant that the satisfaction was not in all things properly and legally executed and recorded. He further averred that plaintiff had been guilty of laches in that he permitted two and one-half years to elapse before commencing the action, and that during said time said Hjort and Charles P. Smith had removed from the state.

The case came on for trial upon these pleadings. At the close of plaintiff's case, defendant's counsel moved for a dismissal on the ground that plaintiff had failed to establish the averments of his complaint. The motion was taken under advisement. Later the trial court made its decision, and filed findings of fact and conclusions of law in favor of the defendant. Judgment was entered accordingly, and plaintiff has appealed to this court, and demanded a trial anew.

The sole question presented in this case is whether the evidence adduced by the plaintiff established a prima facie case.

The undisputed evidence shows that Smith and his wife executed and delivered the promissory note and mortgage, and that the mortgage was recorded in the office of the register of deed's office, as alleged in the complaint; that the note was given in payment of a certain heating plant installed by the plaintiff for Smith in a dwelling house on the premises in controversy; that on December 6, 1915, the defendant Wilhelmson purchased the premises from Smith; that in such transaction Hjort acted as Smith's agent; that Wilhelmson agreed to pay \$12,000 for the premises; that \$9,192 of said amount consisted of encumbrances against the premises; and that Wilhelmson paid the balance, either in cash at the time of the sale or by notes then given and later paid; that Wilhelmson made no examination of the title or the amount of encumbrances outstanding, but took Hjort's word upon the matter. The only reasonable inference to be drawn from the evidence is that plaintiff's mortgage (while of record) was not included in the \$9,192 of encumbrances which were deducted in computing the purchase price, and that the defendant Wilhelmson had no actual knowledge of such mortgage.

As regards the delivery to Hjort of the satisfaction of the mortgage, and the note secured thereby, the plaintiff testified:

Direct examination:

Q. Did you afterwards execute a satisfaction of the mortgage?

A. Yes.

Q. After the mortgage was given and after that \$90 was paid?

A. Yes.

Q. At whose request did you sign it?

A. Karl Hjort's.

Q. How did you come to sign that satisfaction?

A. Hjort said that he would have my money for me in three days if I would sign and release the mortgage.

Q. Did he tell you that he was going to put the release on record without getting the money?

A. No, he didn't say anything about that.

Q. Did he tell you he would not deliver the note and satisfaction until it was paid?

A. Well, I don't know as to that. . . .

Cross-examination:

Q. Do you usually deliver a note and mortgage, or satisfaction of mortgage before the same is paid?

A. No; I didn't deliver over any note; *he had the note all that time.*

Q. Had the note for collection?

A. He had the note in his possession.

Q. Did Mr. Hjort hold this note for collection?

A. *He had the note all the time*; he never turned it over to me.

Q. Do you know whether or not Karl Hjort collected money with which to pay you?

A. No, I don't.

Q. Karl Hjort may have collected the money with which to pay you, may he not?

A. He may have.

Q. As stated before, you regarded Mr. Hjort as your agent for the collection of this note, this money?

A. Yes.

The plaintiff further testifies that he had never received payment of

his mortgage from Hjort, Wilhelmson, or anyone else. He further testified that he had no knowledge of any conspiracy between Hjort and Wilhelmson, and that he did not believe that "Wilhelmson would be willing to take advantage of it in case his attorney could get a mortgage satisfied without his paying it."

Wilhelmson, who was called for cross-examination under the statute, testified to his purchase of the land from Hjort, as representative of Smith. He further testified to the method of arriving at, and payment of, the purchase price; that he (Wilhelmson) had no knowledge of the existence of plaintiff's mortgage, and that he has not paid it, or been requested to do so.

Does the evidence adduced by the plaintiff, viewed in the light of applicable legal presumptions, establish that plaintiff's mortgage is a valid and existing lien against the premises? The writer is inclined to the view that the evidence is insufficient, and that the trial court properly ordered a dismissal of the action. But a majority of the court are of the opinion that the evidence, while unsatisfactory, is sufficient to establish a prima facie case, and that therefore the trial court erred in dismissing the action. All the members of the court, with the exception of Mr. Justice Robinson, are of the opinion, however, that the defendant, in any event, ought to be afforded an opportunity to present his defense. The judgment appealed from is therefore reversed and the cause is remanded for further proceedings. All costs, including the cost on appeal, will abide the final determination.

BRONSON and GRACE, JJ., concur.

BIRDZELL, J. (concurring in part and dissenting in part). While it appears that the plaintiff alleged more than was necessary for him to prove in order to establish a prima facie case, I am of the opinion that the evidence adduced was not sufficient to establish prima facie that the plaintiff is the holder of an existing mortgage securing an existing indebtedness. It is consistent with the plaintiff's evidence that Hjort was acting as his agent in collecting the indebtedness from Smith, and it nowhere appears that Hjort did not, in fact, make the collection. In reality, this would seem to be the only reasonable inference to be drawn from the plaintiff's own testimony. And if Smith had, in fact, paid

the indebtedness to Hjort and the money has not been paid over, it would seem to be clear that Hjort has embezzled the plaintiff's money. In these circumstances it should not be incumbent on the defendant to establish the nonpayment by Smith.

Since a majority of the court, however, takes a different view of the evidence, I concur in the holding that the defendant should be afforded an opportunity to present his defense.

ROBINSON, J. (concurring). This is an action to foreclose a mortgage dated August 18, 1915, made to the plaintiff by Charles P. Smith and wife, who then owned the land described in the complaint. On August 20, 1915, the mortgage was recorded in the office of the register of deeds, Traill county. It was made to secure \$467.65 on October 1, 1915. No part of the mortgage debt was paid, excepting \$90 on August 27, 1915. After the making of the mortgage, to wit, on September 6, 1915, the mortgagor conveyed the land to defendant, subject to all mortgages of record in the office of the register of deeds.

Defendant Wilhelmson admits that he owns the land, and alleges that the plaintiff has been guilty of laches by not sooner commencing the action. The answer does not plead payment or show any defense to the action. On the trial it appeared that plaintiff had given a satisfaction of mortgage, which was recorded, and, for that reason, judgment was given that the action be dismissed. The satisfaction is dated June 2, 1916, and recorded on the same day at 1:15 p. m. The action was commenced on March 11, 1919, and the case tried in July, 1919. Defendant swears that he never paid the mortgage, and he knew nothing of the satisfaction until "a year ago;" that is, a year before July, 1919. Hence it is certain that defendant was not deceived or injured by the satisfaction. He did not make payment relying on it, and there is no claim that he made payment. And there is no plea of payment, which is an affirmative defense.

Under the evidence and the facts, it is sheer nonsense for defendant to talk of laches, the failure of plaintiff to demand payment, or to demand a cancelation of the satisfaction; or a failure to bring a personal action against him. There is no pretense that defendant is liable to a personal judgment. The plaintiff has no cause of action, except for

the foreclosure of his mortgage. But defendant claims that he was taken by surprise by reason of the court granting his motion for judgment before he had offered any evidence, and hence he wants to have the case remanded for a new trial, or the taking of additional testimony; but the plaintiff and the defendant do both testify that there was no payment, and so it seems there can be no possible defense to the action, and, on the answer and the record as it stands, it does not appear that the defendant has a possible defense, and he should not blame the court for granting his motion for judgment. If he did not care for judgment, he should not have made the motion, and it does appear that the motion was argued by both counsel and deliberately decided, and that it was no surprise to the defendant. Hence the judgment should be reversed, with costs, and directions to enter a judgment in favor of the plaintiff, as demanded in the complaint. But if counsel for defendant conclude to move for a rehearing, he may serve and file, as part of the motion, a verified answer showing a good and meritorious defense, and may show how he was injured or prevented from maintaining his defense.

Judgment reversed.

MILTON KAVANAUGH, a Minor, by P. J. Kavanaugh, His
Guardian ad Litem, Respondent, v. A. J. NESTLER, Appellant.

(177 N. W. 647.)

Appeal and error—new trial—supreme court will assume trial judge found evidence insufficient in absence of memorandum.

1. Where the order granting a new trial recites that it is granted for the reason, among others, that the trial court is "of the opinion . . . that the evidence is insufficient to support the verdict," the supreme court, in reviewing the order, must assume that the trial court, in ruling on the motion for a new trial, determined that the evidence was insufficient, and exercised his discretion in favor of such motion, even though he did not prepare and file a written memorandum stating the grounds on which his ruling was based, as prescribed by § 7945, Comp. Laws 1913.

Appeal and error—new trial—discretionary with trial judge.

2. When a motion for a new trial embraces the ground that the evidence

does not justify the verdict, the motion, upon such ground, is addressed to the sound judicial discretion of the trial court; and the order made thereon, based upon such ground, will not be reversed in this court, unless the record discloses a case of abuse of discretion. This is especially true in cases where a new trial is ordered in the court below.

Appeal and error — no abuse of discretion in granting a new trial.

3. It is *held* that there was no abuse of discretion in ordering a new trial upon the ground of insufficiency of the evidence in this case.

Opinion filed April 12, 1920. Rehearing denied May 8, 1920.

Appeal from Burke County, *Leighton, J.* Verdict for defendant. From an order granting a new trial defendant appeals.

Affirmed.

B. L. Wilson and Palda & Aaker, for appellant.

The question of whether a driver has been guilty of negligence in causing an injury is one of fact for the jury's determination. 4 Ann. Cas. 399.

A pedestrian has the right to presume that a driver of an automobile will exercise proper precaution. In a like manner a person operating an automobile has the right to act upon the assumption that every person whom he meets will exercise ordinary care and caution, according to the circumstances and will not negligently or recklessly expose himself to danger. *Weil v. Krutzer*, 24 L.R.A.(N.S.) 557; *Arseneau v. Sweet*, 106 Minn. 257, 119 N. W. 46; *Seaman v. Mott*, 110 N. Y. Supp. 1040, 24 L.R.A.(N.S.) 559.

The question of proximate cause is one of fact for the jury where the injury depends upon a state of facts from which different minds might reasonably draw different inferences. *Chambers v. Soo R. Co.* 37 N. D. 377; *Felton v. Midland Continental R. R. Co.* 32 N. D. 223.

No one but a jury can rightfully pass on the question of how an ordinary prudent man would act under like circumstances. *Arseneau v. Sweet* (Minn.) 119 N. W. 46; *Orr v. Gorabold*, 85 Ga. 373; *McNamara v. Beet*, 21 Ind. App. 483; *Coombs v. Purrington*, 42 Me. 332; *Riley v. Farnum*, 62 N. H. 42; *Myers v. Lewis*, 43 Mo. App. 417; *Birkett v. Knickerbocker Ice Co.* 110 N. Y. 504.

Ben Combs and Greenleaf, Wooledge, & Lesk, for respondent.

It was also proper to instruct that if the driver of defendant's machine saw, or should have seen, that another automobile was approaching from the opposite direction, and that between the two, plaintiff, who

was on foot, would be placed in a dangerous position, it was his duty to stop until the danger was past, and that his failure to do so rendered the defendant liable, even though in keeping out of the way of the other machine plaintiff inadvertently stepped back too far and in front of defendant's. 157 Fed. 521; New York Transport Co. v. Garside (Circuit Court of Appeal, Second Circuit, November 7, 1907.)

"It was negligence for the operator of the automobile not to stop it when he had the chance to do so, upon seeing that collision with a pedestrian was imminent." 50 So. 449.

"He must run his car only at such speed as will enable him to entirely stop it to avoid collision." Erwin v. Judge (Conn.) 71 Atl. 572.

PER CURIAM. Plaintiff brought this action to recover damages alleged to have been caused by defendant's negligence. The jury returned a verdict for the defendant. Plaintiff made a motion for a new trial. The motion was granted and defendant has appealed.

The evidence shows that on October 15, 1917, about 5 o'clock in the afternoon, the plaintiff, a boy about thirteen years old, was struck and knocked down by an automobile owned and operated by the defendant. The accident occurred on the highway about a mile or a mile and a quarter northwest of Carpio in this state. The plaintiff and the defendant were both traveling in the same direction. The view between them was unobstructed for a distance of at least three fourths of a mile. The defendant admits that he saw the boy for a distance of at least 60 feet immediately before striking him. At the place where the accident occurred the highway was approximately 16 feet wide. On the right-hand side of the highway, as the plaintiff and defendant were traveling, was a so-called railroad ditch. Coming along the same highway in the opposite direction were two automobiles going at a rather rapid rate of speed. The plaintiff was walking within a distance of from 2 to 4 feet of the railroad ditch. The defendant, according to his testimony, was driving the car at a very low rate of speed. Shortly before the boy was struck they were met by the first automobile, and the plaintiff was struck and knocked down by the defendant's automobile just as the second automobile was meeting them. There is some evidence to the effect that the day was quite windy. It is undisputed that the plaintiff was knocked down, and that the defendant himself ex-

tricated the plaintiff from under the automobile and took him to plaintiff's home, where he was placed in bed and a physician called. Upon the question of the extent of plaintiff's injuries the evidence was very conflicting.

As already stated the jury returned a verdict for the defendant. The plaintiff thereupon moved for a new trial on the ground, among others, that the evidence was insufficient to support the verdict, and the particulars in which the evidence was claimed to be insufficient was recited in detail. In the order granting a new trial, the trial court stated that a new trial was ordered because he was "of the opinion that the verdict is against law and contrary to the evidence and instructions of the court, and that the evidence is insufficient to support the verdict."

Section 7945, Comp. Laws 1913, provides: "With all orders granting or refusing a new trial the judge shall file a written memorandum concisely stating the different grounds on which his ruling is based, and unless the insufficiency or unsatisfactory nature of the evidence is expressly stated in such memorandum, as a reason for granting the new trial, it shall be presumed, on appeal, that it was not on that ground."

The record on this appeal does not contain any memorandum as prescribed by this section. It will be noted, however, that the order granting a new trial recites the grounds upon which the ruling was based, and, among others, it is stated that the court was "of the opinion . . . that the evidence is insufficient to support the verdict."

The purpose of § 7945, Comp. Laws 1913, was to obviate the rule formerly existing, that "where no reason is given by the trial judge for the order granting a new trial, if the evidence was conflicting and insufficiency of the evidence was one of the grounds of the motion, it will be presumed on appeal that it was granted because of insufficiency of the evidence, and the order will be affirmed." Spelling, New Tr. & App. Pr. § 237. See also *Davis v. Jacobson*, 13 N. D. 430, 101 N. W. 314. In this case there is no room for the application of presumption. We are not in the dark as to the reasons why the trial court granted a new trial. The reasons are specifically stated in the order. The purpose sought to be accomplished by the statute has been achieved. Manifestly we cannot say that insufficiency of the evidence was not a reason for granting a new trial, when the order which is assailed on the appeal expressly says that it was.

It is settled by the overwhelming weight of authority, in all states having statutes similar to ours, that a motion for a new trial on the ground of insufficiency of the evidence is addressed to the sound legal discretion of the trial judge, and that an order granting or refusing it will not be disturbed unless it appears that there has been a manifest abuse of discretion. *Spelling*, New Tr. & App. Pr. § 237; *Hayne*, New Tr. & App. Rev. ed. § 97. The rule has repeatedly been announced and applied by this court. See *Gull River Lumber Co. v. Osbrone McMillan Elevator Co.* 6 N. D. 276, 69 N. W. 691; *Heyrock v. McKenzie*, 8 N. D. 601, 80 N. W. 762; *Pengilly v. J. I. Case Threshing Mach. Co.* 11 N. D. 249, 91 N. W. 63, 12 Am. Neg. Rep. 619; *Galvin v. Tibbs, H. & Co.* 17 N. D. 600, 119 N. W. 39; *Nilson v. Horton*, 19 N. D. 187, 123 N. W. 397.

In *Gull River Lumber Co. v. Osbrone McMillan Elevator Co.* supra, this court said: "We need only call attention to the familiar rule that where a motion for a new trial is made in the trial court upon the ground that the verdict is not justified by the evidence, such motion is addressed to the sound discretion of the tribunal which heard and saw the witnesses, and therefore had advantages in weighing the testimony which are not possessed by an appellate court. In such cases, and especially where the verdict is set aside, and a new trial granted, an appellate court will not reverse the order merely upon the ground that there was some conflict in the evidence. The application for a new trial upon such ground being addressed to the sound discretion of the court below, an order of that court will not be reversed unless the record discloses a case of abuse of discretion. This is especially true where a new trial has been granted. This rule has long since passed the boundaries of debate. See *Hayne*, New Trial, § 97, and cases cited in the notes to said section."

In *Pengilly v. J. I. Case Threshing Mach. Co.* supra, this court said: "Under such circumstances a margin of discretion is vested in trial courts, which permits them, with a view to promoting the ends of justice, to weigh the evidence, and, within certain limitations, act upon their own judgment with reference to its weight and credibility. Nor, in such cases will the court necessarily be governed by the fact that the verdict returned has the support of an apparent preponderance of the evidence. Unrighteous verdicts sometimes are supported by apparent

substantial evidence, and to meet such exceptional cases the presiding judge, who sees and hears the witnesses, is vested with a discretion to vacate such verdicts and order a new trial in furtherance of justice. The rule that governs a court of review in this class of motions—*i. e.*, those which appeal to judicial discussion—does not apply to trial courts, and hence the trial court is not debarred from granting or refusing a new trial by the mere fact that the verdict rests upon substantial or conflicting evidence. Hayne, New Tr. § 97. This discretion, however, is neither capricious, arbitrary, nor unrestricted. It is, on the contrary, a reasonable discretion, to be exercised with great caution, and in cases of abuse the trial court will be reversed by the reviewing court in this class of cases. The duties devolving upon a court of review in this class of cases are to be distinguished from those which govern in trial courts. In the reviewing tribunal the weight and credibility of testimony will only be considered with a view to determine whether the order made in an inferior court, when acting within the domain of discretion, was or was not an abuse of discretion. . . . In the case at bar the order appealed from granted a new trial. Such orders, when based upon the insufficiency of the evidence, are rarely reversed by a reviewing court, and never except upon grounds which are strong and cogent. The reason for discriminating in favor of such orders is that they are not decisive of the case, but, on the contrary, only open the way for a reinvestigation of the entire case upon its facts and merits.”

The rule thus announced is supported by the overwhelming, and we might say unanimous, weight of authority. See Hayne, New Tr. & App. Rev. ed. § 97; Spelling, New Tr. & App. §§ 237, 238, and authorities there cited.

As pointed out in Pengilly v. J. I. Case Threshing Mach. Co. *supra*, the granting of a new trial does not finally dispose of the case. Nor does it deny the right of trial by jury. On the contrary the discretionary power is vested in the trial judge to the end that he may see that a fair and impartial trial by jury is had.

We are not aware of any error of law occurring upon the trial of this case which justified a new trial. We are also of the opinion that, under the evidence, negligence, proximate cause, and contributory negligence, were questions for the jury. But a careful consideration of

the evidence leads us to the conclusion that the trial court did not abuse its judicial discretion in ordering a new trial on the ground of insufficiency of the evidence.

Order affirmed.

CHRISTIANSON, Ch. J., and BIRDZELL and ROBINSON, JJ., concur.

GRACE, J. (dissenting). We agree, it is well settled by the weight of authority, that a motion for a new trial is addressed to the sound, legal discretion of the trial judge, and that an order granting or refusing it will not be disturbed, unless it appears there has been plain abuse of discretion. This case, however, does not come within that rule.

It is also granted that the rule applies to an order granting a new trial, on the ground of the insufficiency of the evidence. The discretion, however, exercised by the trial court, must be a sound, judicial discretion, and where the record, like this, affords nothing upon which such discretion rests, it is plain there is an abuse of such discretion.

It is conceded by the majority opinion that there is no error at law in the record; that the instructions of law, as given by the court, were correct; at least, they afforded no ground for prejudicial, reversible error.

It is also conceded there was no error in the reception, nor in the exclusion of evidence offered. It must also be conceded, and we think it is, that the evidence is amply sufficient to support the verdict.

The action was one for damages against the defendant, for alleged negligence in the operation of a certain automobile, which, while being operated by him, was propelled against the plaintiff, who was, to some extent, injured. Among other defenses of the defendant, was that of contributory negligence of the plaintiff.

The questions of negligence and contributory negligence were each, exclusively, questions of fact for the jury; and, after having been instructed as to the law of negligence and contributory negligence, it was its exclusive right and duty to determine those questions. It did do so, and returned a verdict in favor of the defendant, thus finding that he was not guilty of negligence.

The evidence, as a whole, clearly shows that the verdict is sustained.

by it. The evidence, as a whole, shows that there is no insufficiency of evidence to support the verdict. In such case, it is plain the trial court abused its discretion in granting a new trial.

It is clear that the discretion exercised by the court was not a judicial, but an arbitrary, one, and one entirely and wholly unwarranted by the evidence in the case.

To permit the exercise of such an unwarranted and arbitrary discretion, one wholly and entirely unsupported by any evidence, or any incident in the trial, is virtually to strike down the right of a jury trial, and the benefit derived thereunder, and to defeat the defendant's constitutional right thereto; or if it can be held that a case, such as this, is not the exercise of an arbitrary, unwarranted discretion, it finding absolutely no support in the record, then no case could arise in which it could be said that a discretion exercised was an arbitrary one.

The right of trial by jury is the great bulwark of personal liberty and individual rights. The functions of the jury are, wholly and entirely, separate and distinct from those of the court, and, in the case of a trial by jury, unless there is error at law in the record, or unless the verdict of the jury is not sustained by substantial evidence, its verdict should be decisive upon questions of fact.

There are, perhaps, quite a number of people, and perhaps, certain classes of litigants, and perhaps, some courts, who think, that law and justice would be better and more scientifically administered by the courts alone, exclusive of the jury; that the determination of facts, as well as the law, should be, exclusively, a function of the court, and such as they bewail the alleged ignorance and prejudice of the juries, which of course do not exist.

But, for all this, the fact still remains that the jury, drawn, as it is, from the body of the people, remains the greatest bulwark of personal liberty and individual rights. So thought the fathers of our country, when they incorporated that principle in our Federal Constitution; that principle is a part of the Constitution of every state of the Union. It is the principle which protects the weak against the strong, the poor against the rich. It is a great equalizer of rights, and, in the last analysis, it is intended to be a protection, even against the powers of the court.

The case being wholly free from error, the judgment should be affirmed.

BRONSON, J., concurs.

JOHN E. STAIR, C. A. Christiansen, and W. O. Timerman, Co-partners Doing Business under the Firm Name of Stair, Christiansen, & Timerman, Respondents, v. JOSEPH MARQUART, Appellant.

(178 N. W. 121.)

Payment—directed verdict for plaintiffs in action for money paid under mistake held proper.

1. In an action to recover the proceeds of a carload of oats, by mistake credited to the account of and paid to the defendant, where the defendant counterclaimed by alleging the consignment of two carloads of wheat to the plaintiffs for which no accounting has been made, it is *held*, upon this record, that the trial court did not err in directing a verdict for the plaintiffs.

Pleading—allegation admitted by answer presents no issuable fact.

2. Where the complaint alleges a partnership, and the owner admits such partnership, there is no issuable fact concerning the same, and proof, in denial, was properly rejected.

Opinion filed May 10, 1920.

Action in District Court, Logan County, *Graham, J.*

From a judgment rendered for the plaintiffs upon a directed verdict, the defendant has appealed.

Affirmed.

A. B. Atkins and *W. S. Lauder*, for appellant.

The jury are the sole and exclusive judges of the weight of the testimony, the credibility of the witnesses, and of the facts. *Taylor v. Jones*, 3 N. D. 236.

The court will not direct a verdict, even where there is no conflict in the testimony, if the evidence is such that different minds may reasonably draw different conclusions therefrom. *Clemens v. Royal*

Neighbors, 14 N. D. 116; Boughton Implement Co. v. Vavrowski (N. D.) 125 N. W. 1024; Edwards v. Chicago & R. Co. 21 S. D. 504; Hall v. N. P. R. Co. 16 N. D. 60; Walkin v. Horswill (S. D.) 123 N. W. 668; Berry v. Chicago etc., Ry. Co. (S. D.) 124 N. W. 859; Casey v. First Nat. Bank (N. D.) 126 N. W. 1011.

Where there is a conflict in the evidence, the verdict of the jury is conclusive on the supreme court, as that court will not weigh the evidence, and will go no further than to determine whether there was legal evidence sufficient to sustain the verdict, without regard to the evidence of the adverse party. Olson v. Day, 23 S. D. 150; Mosteller v. Holborn, 20 S. D. 545; Grant v. Powers Dry Goods Co. 23 S. D. 195; Jackson v. Grand Forks, 140 N. W. 718.

Scott Cameron and George M. McKenna, for respondents.

The court was authorized to direct a verdict at the close of the case, as both parties moved for a directed verdict. Stanford v. McGill, 6 N. D. 563; First Methodist Episcopal Church v. Fadden, 8 N. D. 162; Duncan v. Great Northern R. Co. 17 N. D. 610; Bank of Park River v. Norton, 12 N. D. 497; Larson v. Calder, 16 N. D. 248; Citizens Nat. Bank v. Osborne-McMillan Elev. Co. 21 N. D. 335.

BRONSON, J. *Statement*.—This is an action to recover the proceeds of a carload of oats paid by mistake to the defendant. The defendant, in its answer, made a general denial of plaintiff's claim, and, as a counterclaim, alleged that two carloads of wheat were shipped to and received by the defendant for which payment had not been made.

The facts substantially are:

During the years of 1915 and 1916 the defendant operated an elevator at Napoleon, North Dakota; the plaintiffs were copartners in the grain commission business, at Minneapolis and Duluth. Throughout 1915 and 1916 the defendant shipped grain in carload lots to the plaintiffs. Customarily such shipments were made under bills of lading, which were forwarded to the plaintiffs.

Upon the sale of a carload shipment, an account of the sale was rendered, itemizing the gross and net proceeds, together with a state weigh master's certificate and train inspector's certificate thereupon. Monthly, a statement was rendered covering the grain, the proceeds

thereof, and the accounting therefor including interest items pro and con.

On January 19, 1916, the defendant was credited on the books of the plaintiffs with the proceeds of car *No. 206,133*, amounting to \$630.36. Pursuant to plaintiffs' books, and a statement rendered to the defendant showing a balance due of \$4,391.81, this item, included with other items, was finally paid to the defendant the latter part of August, 1916. Subsequently, it was discovered (per plaintiffs' evidence) that this car *No. 206,133* was a carload of oats, and had been shipped to the plaintiffs by one Decker. Accordingly, on February 10, 1917, the plaintiffs charged to the account of the defendant the proceeds of such car, amounting to \$630.36, and, on the same date, credited to the account of Decker such amount including an adjustment for the interest. The defendant admits that he never shipped any oats to the plaintiffs, and that a settlement was made on the account between the parties through payment of said \$4,391.81 by the plaintiffs. However, in defendant's parol evidence, it is categorically denied that they ever received, in fact, any credit for this carload of oats; that the monthly statement rendered for January, 1916, to the defendant did not show this carload of oats, and that the settlement made by which the amount above stated was received covered only what was due the defendant, excepting only the two carloads of wheat.

In the operation of the defendant's elevator, a book was kept which shows the grain bought or sold, and the carload shipments of grain to the plaintiffs; also, a book containing bills of lading in blank form, which customarily the defendant made out, when carload shipments were made, in triplicate form,—one of which was sent to the plaintiffs, one retained by the railroad, and the third by the defendant. In support of their claim, the plaintiffs introduced in evidence their books of account with the defendant from beginning to end, the account of said Decker, the evidence of their traveling auditor concerning attempts to adjust this matter with the defendant, and that of their book-keeper concerning their books, and in explanation of the particular item concerning the carload involved herein.

In support of his counterclaim, the defendant introduced his triplicate copy of a bill of lading, dated November 12, 1915, showing the shipment of a carload of wheat, weight 60,000 lbs., in car *No. 184,171* to

the plaintiffs; also another bill of lading, dated November 15, 1915, showing a shipment of a car of wheat, weight 80,000 lbs. in car *No. 265,610* to the plaintiffs; also its books of account showing the shipment of such carload to the plaintiffs on such respective dates for which no settlement had been made; also the value of such carloads of wheat. Concerning these *car numbers* on such carloads of wheat, there is a dispute in the evidence between the parties.

As stated, the books of the defendant show the shipment of these two carloads bearing such car numbers on November 12, and 15th, 1915, respectively. Likewise, his book of the bills of lading. They do not, however, show the shipment of any other carloads of wheat to the plaintiffs on these respective dates. The defendant's parol evidence is to the effect that these car numbers had been erased or rubbed out, and that the plaintiffs' auditor had so erased and replaced such car numbers as they originally existed. This is absolutely denied by the plaintiffs' auditor.

The agent of the Soo Railway Company, having in his possession the railway company's bill book of weigh bills, testified that, on November 12, 1915, there was only one car shipped by the defendant to the plaintiffs, being a carload of wheat, weight 60,000 lbs. in Soo car *No. 24,474*; that, on November 15, 1915, there was only one car shipped by the defendant to the plaintiffs, being a carload of wheat weight 80,000 lbs. in C. P. car *No. 208,640*; that on November 12, 1915, no such car as *No. 184,474* was shipped out of the station at Napoleon; that on November 15, 1915, no such car as C. P. car *No. 265,610* was shipped out of such station on that date. On the consignment sheets of the plaintiffs, which show the consignments received from the defendant, it appears that the carload *No. 24,474*, shipped November 12, 1915, was sold November 19, 1915; that likewise the carload *No. 208,640*, shipped on November 15, 1915, was sold on November 22, 1915. On the books of the plaintiffs, on November 24, 1915, the proceeds of carload *No. 24,474*, in the amount of \$760.70, and, of carload *No. 208,640* in the amount of \$865.72, were credited. That these amounts were paid the defendant in the settlement had with the defendant. The defendant's books do not show any shipment charged, nor any payment for such carloads, numbered *24,474* and *208,640*, so shipped on November 12th and 15th, respectively.

The Soo agent admitted that the triplicate copies of the bills of lading were signed, one by himself, and the other by his helper; but he testified that elevator men sometimes made mistakes in putting the numbers of cars down, and that the actual carloads that were shipped out on the dates mentioned were these concerning which he had testified. At the conclusion of the case both parties moved for a directed verdict, with the reservation, however, by the defendant that, if his motion were overruled, the case be submitted to the jury. The court granted plaintiffs' motion and denied the defendant's. The jury, accordingly, returned a verdict for the plaintiffs for the carload involved, with interest. The defendant has appealed from the judgment entered thereupon.

Contentions.—The defendant has specified many assignments of error. As stated by his counsel upon oral argument, these substantially concern the alleged error of the trial court in directing a verdict. Substantially, the defendant contends that there is proof in the record sufficient to constitute a question of fact for the jury, whether the carload of oats was in fact credited to the account of, and paid to, the defendant. That, concerning the verity of this credit and payment, which appears from plaintiffs' books and evidence, there was an issue of fact for the jury created through plaintiffs' correspondence and defendant's parol evidence in that regard; that concerning the counterclaim, there was an issue of fact for the jury through the evidence offered on the part of the defendant, tending to show the shipment of the two carloads of wheat bearing the *specific numbers* designated, for which carloads *so numbered* there is no showing of specific payment therefor. That, furthermore, the trial court erred in refusing to permit the defendant to prove that the plaintiffs were not the real parties in interest.

Opinion.—The record is somewhat long; the essential facts only, necessary for the consideration of the primary questions involved, have been stated.

Were there any questions of fact for the jury in this record concerning (first) whether the defendant was credited with and received payment of car No. 206,133, and (second) whether there were two carloads of wheat, consigned to and received by the plaintiffs, for which payment has not been made?

Upon a consideration of the entire record we are of the opinion that the trial court did not err in directing a verdict for the plaintiffs. It is clearly established that the defendant did receive payment for carload *No. 206,133*, credited to defendant's account in the sum of \$630.36 on January 19, 1915. The defendant does not claim, nor does its books show, that it ever shipped such carload *No. 206,133* to the plaintiffs. Manifestly it is immaterial what the car contained, except so far as it serves to explain the reason for the erroneous entry. The defendant admits that he never shipped any oats to the plaintiffs. If, therefore, this were a carload of oats, the defendant did not ship the same. However, the defendant's evidence is positively stated that whenever a shipment is made to the plaintiffs the consignment was entered upon his books. The parol evidence of the defendant, that it never received any return for a carload of oats; that no accounting was ever made to it for such carload of oats; and that, if such had been made, it would have been placed on his books,—is entirely disproved by the books of the plaintiffs, and their statements rendered to the defendant. These show without contradiction, by the books or the testimony of the defendant, that necessarily, in the settlement made, when the item of \$4,391.81 was paid, the item for carload *No. 206,133* was included and formed a part of the account necessary to create such balance in favor of the defendant. The statements received by the plaintiffs, retained in their possession, produced in court, and offered in evidence, established this fact from the balances thereof. Upon no other theory can such balance be explained from the record in this case. There is no complaint by the defendant of any nonpayment by the plaintiffs, excepting for the carloads of wheat bearing the specific numbers designated in defendant's books and book of bills of lading. Concerning these items it is equally clear that there were only two carloads of wheat shipped to the plaintiffs on November 12, and 15, 1915, respectively. There is no dispute between the parties as to these two carloads of wheat. The dispute alone concerns the numbers with respect to those two carloads of wheat. Plainly the dispute is a question of numbers, and not of carloads. This mistake in numbers, therefore, is immaterial unless it referred to two additional cars of wheat consigned to the plaintiffs, or concerned a mistake made by substitution of cars. Upon the latter grounds no claim is made in this record.

There two carloads of wheat shipped on November 12 and 15, 1915, respectively, are the only two claimed to have been so shipped by the defendant, by the railway company, and by the plaintiffs. These have been credited and paid to the defendant without objection. The monthly statement so received, retained, and produced in court by the defendant, show these very items for such two carloads of wheat credited. These carloads so credited and paid correspond as to dates and as to quantity with the charge made on defendant's books. The question, therefore, of the dispute in numbers is wholly immaterial. There was, therefore, no evidence for the jury, which would cause reasonable men to draw different conclusions upon the questions involved. Obviously, the defendant might not create an issue of fact for the jury by parol testimony that two plus two makes a different sum than four. See *State Bank v. Bismarck Elevator & Invest. Co.* 31 N. D. 102, 106, 153 N. W. 459. In the complaint the plaintiffs allege a copartnership. In this answer this is admitted. The trial court did not err in rejecting the offer of proof that the partnership of the plaintiffs was no longer existing. This was not an issuable fact. The judgment is, in all things, affirmed, with costs to the respondents.

JOSEPH SCHNEIDER, Respondent, v. JOSEPH MARQUART,
Sr., Appellant.

(178 N. W. 195.)

Animals — trespass suit held not barred by sixty-day limitation.

In an action to recover damages occasioned by defendant's cattle, horses, and swine trespassing upon plaintiff's premises in the fall of 1918 and destroying certain grain in stack, it is held:

1. The provisions in § 8500, Comp. Laws 1913, to the effect that a party claiming damages under chap. 45 of the Code of Civil Procedure, Comp. Laws 1913, shall bring an action to recover the same within sixty days after the infliction of such damages, has reference to an action wherein the plaintiff has seized, and seeks to impress the claim for damages as a lien against, the offending animals.

Animals — trespass suit held governed by six-year limitation.

2. Where the offending animals have not been restrained; where no attempt

has been or is made by the party injured to obtain the benefit of the lien upon trespassing animals afforded by chapter 45 of the Code of Civil Procedure; and where the lands trespassed upon were not within the limits of a stock district (Comp. Laws 1913, §§ 2618-2626) an action to recover damages occasioned by trespassing animals is controlled by § 7375 (subd. 3), Comp. Laws 1913, and and may be maintained at any time within six years after the cause of action accrued.

Opinion filed May 18, 1920.

From a judgment of the District Court of Logan County, *Allen, J.*, defendant appeals.

Affirmed.

Arthur B. Atkins and *Scott Cameron*, for appellant.

"Codes exclude common law. In this state there is no common law in any case where the law is declared by codes." Comp. Laws 1913, § 4431; 1 R. C. L. Animals, ¶ 45.

"To have enforced the common-law rule would have retarded the settlement of the country, and have been against the policy of both the general and state government." *Wagner v. Bissell*, 3 Iowa, 396; *Heath v. Coltenback*, 5 Iowa, 490; *Haughey v. Hart* (Iowa) 17 N. W. 189; *Little Rock & Ft. S. R. Co. v. Finley*, 37 Ark. 562; *St. Louis, I. M. & S. R. Co. v. Newman*, 28 L.R.A.(N.S.) 83; 2 Cyc. 395 and cases cited; *Kerwaker v. Railroad Co.* 3 Ohio St. 179; *Seeley v. Peters*, 5 Gill. 142.

The rule of the common law so far as applicable has been declared by statute in this state. *Ely v. Rosholt*, 11 N. D. 559, 93 N. W. 864.

"Where the statute imposes a new duty where none existed before, and gives a specific remedy for its violation, the presumption is that this remedy is meant to be exclusive, and the party complaining of a breach is confined to it." *Cooley, Torts*, 3d. ed. § 1399.

Geo. M. McKenna and *Miller, Zuger, & Tillotson*, for respondent.

This is an affirmative defense, and the facts must appear. *Satterlund v. Beal*, 12 N. D. 122, 95 N. W. 518; 13 Enc. Pl. & Pr. 214 et seq. and cases cited and referred to in notes.

In this state cattle are not free commoners. The common-law rule is in force, and every man is bound, at his peril, to keep his stock upon his own premises, and is liable for all damage done by such stock upon

the lands of another, whether fenced or unfenced. *Bostwick v. Railway Co.* 2 N. D. 440.

CHRISTIANSON, Ch. J. This is an action to recover damages occasioned by defendant's horses, cattle, and swine going upon plaintiff's premises in the fall of 1918, and destroying certain grain in stack. Defendant contends that the action is barred under § 8500, Comp. Laws 1913, for the reason that it was not commenced within sixty days after the injury was inflicted. The sole question presented to this court is whether the action must be commenced within such sixty-day period.

Section 8500, Comp. Laws 1913, reads: "Any person owning or having in his charge or possession any horses, mules, cattle, goats, sheep or swine, which shall trespass upon the lands of another, whether fenced or not fenced, shall be liable to the party injured for all damages sustained by him by reason of such trespassing, to be recovered in a civil action in the county in which such damages occurred, and the proceedings shall be the same in all respects as in other civil actions except as herein modified; provided, that no property shall be exempt from execution issued upon judgments obtained under this chapter except absolute exemptions; and provided, further, that the party claiming damages under the provisions of this chapter shall bring an action to recover the same within sixty days after the infliction of such damages."

Defendant contends that the common-law rule does not obtain in this state; that in the absence of statute, the owner of domestic animals may permit them to run at large at all times, and that those who would avoid injury to their lands from such animals must inclose against them. In other words, defendant contends that the right to recover for damages occasioned by trespassing animals exists only in so far as it is granted by § 8500, supra, and that in absence of such section no cause of action would exist.

The rights and obligations of the owners of live stock have been the subject of a great deal of legislation, as well as of litigation, in this state. See *Bostwick v. Minneapolis & P. R. Co.* 2 N. D. 440, 51 N. W. 761; *Ely v. Rosholt*, 11 N. D. 559, 93 N. W. 864; *Johnson v. Back-*

ford, 18 N. D. 268, 122 N. W. 386; Corbett v. Great Northern R. Co. 19 N. D. 450, 125 N. W. 1054.

Section 8500, *supra*, was embodied in the Revised Codes of the territory of Dakota of 1877, and has since remained a part of the laws of this jurisdiction in substantially its original form. It was considered by this court in *Bostwick v. Minneapolis & P. R. Co.* *supra*, in connection with the very contention advanced by the defendant here. In that case the court said: "In this state cattle are not free commoners. The common-law rule is in force, and every man is bound, at his peril, to keep his stock upon his own premises, and is liable for all damage done by such stock upon the lands of another, whether fenced or unfenced. Comp. Laws, § 5569." 2 N. D. 447.

It was considered in connection with the so-called "Herd Law" in *Ely v. Rosholt*, 11 N. D. 559, 93 N. W. 864; *Johnson v. Rickford*, 18 N. D. 268, 122 N. W. 386; and *Corbett v. Great Northern R. Co.* *supra*. In *Ely v. Rosholt*, 11 N. D. 559, 93 N. W. 864, the court said: "In this state the rule of the common law is declared by statute. That the owner of stock is liable in damages for trespasses by them (Rev. Codes 1899, § 6153; *Bostwick v. Minneapolis & P. R. Co.* 2 N. D. 440, 447, 51 N. W. 781), unless the trespass is committed between the 1st day of November and the 1st day of April (Rev. Codes, 1899, § 1549), and excepting in those counties where, by a majority vote of the electors, had pursuant to the provisions of §§ 1550-1552, Rev. Codes, the operation of the earlier statute has been annulled." 11 N. D. 560.

In *Corbett v. Great Northern R. Co.* *supra*, the court quoted with approval the following language used by the supreme court of Oregon: "The rule [the common-law rule of liability of the owner of stock for damages resulting from trespass] was not founded on any arbitrary regulation of the common law, but was an incident to the right of property. It is a part of that principle which allows every man the right to enjoy his property free from molestation or interference by others; it is simply the recognition of a natural right. A person owning and occupying land is not vested with the right to enjoy it upon condition that he inclose it by a palisade strong enough to keep his neighbors and their stock from breaking into and destroying the fruits of his labors. Property is not held in civilized communities by so insecure a tenure;

but the law surrounds it by an ideal, invisible palladium, more potent than any mechanical paling that can be constructed. The rule in question did not require to be adopted in order to be in force. It always exists where the right of private dominion over things real is recognized. It pertains to ownership. The legislature, in the exercise of the police power of the state, may, no doubt, require the owners of lands to fence them in a certain manner, and in default thereof to withhold from them a remedy for a trespass committed thereon by animals running at large."

The foregoing excerpts speak for themselves, and clearly indicate that this court has recognized that the owners of stock are liable for damages occasioned by their trespassing upon the premises of others, except in so far as the legislature has imposed certain conditions upon the right of the owner of lands to collect such damages.

It should also be noted that the subsequent changes in the so-called "Herd Law" have strengthened rather than weakened the views expressed in *Bostwick v. Minneapolis & P. R. Co.* and *Corbett v. Great Northern R. Co.* supra. Thus at the time *Ely v. Rosholt*, supra, was decided, our statute provided: "It shall be lawful for cattle, horses, mules, ponies and sheep to run at large from the 1st day of November until the 1st day of April of each year. . . . But nothing in this Code shall be construed to repeal any special act establishing a fence law for any county in this state." Rev. Codes, 1899, § 1549. This section was also in force when *Johnson v. Rickford*, 18 N. D. 268, 122 N. W. 386, was decided, with the exception that the time in which animals might run at large had been changed so as to include the period between the 1st day of December and the 1st day of April of each year. See § 1933, Rev. Codes 1905. But in 1913 the section was amended so as to read as follows: "It shall be unlawful for cattle, horses, mules, swine, goats and sheep to run at large at any time except as herein-after provided." Laws, 1913, chap. 178; Comp. Laws, 1913, § 2617. At the same time subsequent sections of the "Herd Law" were also amended so as to provide for the establishment of stock districts in which stock might be permitted at large between certain dates, to be specified in the petition for the establishment of such stock district. See Laws 1913, chap. 178; Comp. Laws 1913, §§ 2618, 2622.

While § 8500, supra, standing alone may be susceptible of the

construction contended for by defendant, it must be remembered that the section is not a complete piece of legislation. It is a mere fragment. The statute of which it forms a part contemplates that the owner of the land shall seize the trespassing animals, and enforce the claims for damages against them. It provides: "The person suffering damages as aforesaid may keep such offending animals in custody until the damages and costs are paid or until good and sufficient security is given therefor, such security to be approved by a justice of the peace in and for said township or county as provided for in cases of bond in arrest and bail." Comp. Laws, 1913, § 8503. "The party sustaining damages from the trespass of animals before commencing an action therefor shall, if he knows to whom such animals belong, notify him or the person having them in charge of such damage and the probable amount thereof." Comp. Laws, 1913, § 8502. "Upon the trial of an action under the provisions of § 8500, the plaintiff shall prove the amount of damage sustained, and, if he has kept in custody the animals committing such damage, the amount of expense incurred therefor. And any judgment rendered, in the action against the defendant shall be a lien upon the animals and they may be sold and the proceeds applied to the satisfaction of the judgment as in other cases of sale of personal property on execution; but if it shall appear upon the trial that no damage was sustained, judgment shall be rendered against the plaintiff for costs and for any damages sustained by defendant." Comp. Laws, 1913, § 8504. Provision is also made for the service of summons in case the owner or person having charge of the offending animals is unknown, as well as for the disposition of any surplus remaining after the satisfaction of the judgment against such unknown owner. Comp. Laws 1913, §§ 8505, 8506.

It is an elementary rule of construction that a statute must be construed as a whole. And the intention of the whole act will control the interpretation of the parts. Lewis's Sutherland, Stat. Constr. 2d ed. §§ 368, 370.

Chapter 45 of the Code of Civil Procedure 1913 (of which § 8500 forms a part) expressly provides that the offending animals may be seized, and the claim for damages enforced against them. The provisions of the statute all look toward speedy action, which of course is essential in view of the expense incident to caring for the animals.

The case before us, however, is not an action to enforce a lien or claim for damages upon the trespassing animals. Here the animals were not restrained. The plaintiff merely asks that he be awarded an ordinary judgment against the defendant for the damages caused by defendant's stock trespassing upon plaintiff's lands. We do not believe that such action must be brought within sixty days after the injury was inflicted. In our opinion such action falls within the provisions of § 7375 (subd. 3), Comp. Laws 1913, and may be maintained at any time within six years after the accrual thereof. We believe that the sixty-day period for the bringing of an action prescribed by § 8500, *supra*, has reference to an action wherein trespassing animals are restrained by the person who has been damaged, and a lien is sought to be impressed on them for the amount of such damages as provided by §§ 8503 and 8504, Comp. Laws 1913.

It follows that the judgment rendered in favor of the plaintiff, upon the verdict returned in this case, must be affirmed. It is so ordered.

WILLIAM OLSON, Respondent, v. A. M. BAKER and C. J. Lee,
Appellants.

(178 N. W. 126.)

Banks and banking—evidence held not to sustain a verdict for balance of price of bank stock.

In this case the plaintiff recovered a verdict and judgment against the defendants for \$1,367.66, and interest, as the balance due on fifty shares of bank stock which Olson sold to defendant Lee. *Held*, that there is no evidence to sustain the verdict.

Opinion filed May 20, 1920.

Appeal from the District Court of Cass County, Honorable A. T. Cole, Judge.

Reversed and dismissed.

Engerud, Divet, Holt, & Frame, for appellants.

"The market value of an article may be received to show the prob-

able price agreed upon." *Zelch v. Hirt* (Wis.) 61 N. W. 20; *Saunders v. Gallagher*, 55 N. W. 600; *Bangart v. Hyde* (Mich.) 53 N. W. 915; *Grabowsky v. Baumgart* (Mich.) 87 N. W. 891; *Weidness v. Phillips*, 114 N. Y. 458; *Rubino v. Scott*, 118 N. Y. 662.

The judgment must be in accord with the pleadings. *Satterland v. Beal*, 12 N. D. 122; *Lowe v. Jenson*, 22 N. D. 148; *Yancey v. Boyce*, 28 N. D. 187; *Comtograph v. Bank*, 32 N. D. 59; *Reed v. Gould*, 53 N. W. 357; *Marshman v. Conklin*, 21 N. J. Eq. 546; *Buchman v. Sepulveda*, 39 Cal. 688.

Winterer, Combs, & Ritchie, for respondent.

"Where the making of an alleged contract to sale is in dispute, the value of the thing alleged to have been sold cannot be proved to show the making of the contract." 9 Cyc. 767, 768; *Gidney v. Turner*, 52 Ark. 117, 12 So. 201; *Pettibone v. Lake View Town Co.* 134 Cal. 227, 66 Pac. 218; *Byrne v. Byrne*, 47 Ill. 507; *Craig v. French*, 181 Mass. 282; *Campau v. Moran*, 31 Mich. 280; *Carpenter v. Taylor*, 164 N. Y. 171; *Doyle v. Edwards*, 15 S. D. 648, 91 N. W. 322.

"It is only in cases where there is nothing to show in writing an agreement to pay a stipulated price for the property that such evidence is admissible." *Carlinville v. Laager*, 129 Ill. App. 647; *Scott v. Realty Co.* 225 Mo. 76, 164 S. W. 532.

Where the plaintiff brings his action in assumpsit, pleading a purchase and sale of the property converted, as was done in the case at bar, it is conclusive evidence that the plaintiff has elected to waive the tort and recover in assumpsit. *Braithwaite v. Aaken*, 3 N. D. 365, 56 N. W. 133; *Boyle v. Poor*, 163 Pac. 967; *Trust Co. v. Pool*, 136 Ill. App. 266.

ROBINSON, J. The complaint is that on January 8, 1918, the plaintiff owned fifty shares of bank stock, which he undertook to sell, and did sell, to the defendants at \$125 a share, with interest, and that by mistake they paid for the same only \$100 a share and interest, amounting to \$5,468.61. The question is on the sufficiency of the evidence to sustain a verdict against either defendant. There is no claim that plaintiff made, or attempted to make, any sale, except through the defendant Baker. There is no claim that Baker purchased or agreed to purchase any stock. The claim is that Baker converted the stock by

delivering it to Lee at \$100 a share, and that by waiving the tort the plaintiff has a right to recover from Baker the contract price. Now the rule is that in an action to recover for the conversion of property the owner may waive the tort. He may allege and prove the reasonable value of the property and a promise to pay the same. The law will imply the promise, because it accords with the exact measure of damages; but in such an action the law never implies a promise to pay an agreed price, which may be more or less than the reasonable value. There is not a scintilla of evidence to sustain the verdict against Baker, as he never offered to purchase the stock. In the deal between the plaintiff and defendant Lee, Baker was a mere friendly go-between. Olson owned fifty shares of the bank stock and wanted to sell it. He requested Baker to find him a purchaser at \$125 a share, with interest from the date of his purchase. In a friendly way, without any commission or any hope of reward, Baker undertook to find a purchaser. He consulted with Mr. Lee, the president of the bank, who offered to pay the price demanded if he could have the stock before the meeting of the stockholders on January 10, 1918. Accordingly, on January 8th, Baker wrote as follows:

Fargo, January 8, 1918.

William Olson,
Valley City.

If you will sell your stock in the Equity Bank *at once* my man is on hand with the cash to take it as per agreement of some time ago, viz., \$125 per share, with 7 per cent interest to January 10th.

Yours,

A. M. Baker.

That was a clear and definite offer. The words "at once" and the words "with interest to January 10th" showed the offer must be accepted on or before January 10th. On January 10th there was to be a stockholders' meeting at Fargo. To avoid friction, which was anticipated and which did occur at the meeting, Lee, who held 200 shares of the stock, wanted to buy out Olson so that he would not be present at the meeting as a trouble maker. Olson did not get the letter, so he was present at the meeting with proxies. He wanted to be a director, and he was the cause of a protracted session and of considerable wrangling.

He was defeated and disgusted. Then, on the evening of January 10th, at the bank building, he saw Baker and said to him that he wanted to get rid of his stock. Then, as Baker testifies, Olson offered to sell the stock at \$100 a share and interest, and Lee offered to pay that sum. Then, on the night of January 10th, Olson went to Valley City, received the letter that Baker had written on the 8th, and the next morning he went to his banker in Valley City, made a draft on Baker for the precise amount of the stock at \$100 a share and interest. The draft is in words as follows:

Valley City, January 11, 1918.

\$5,468.61.

On Demand, pay to the order of the Bank of Valley City, North Dakota five thousand four hundred and sixty-eight & 61/100, dollars Value Received and charge the same to the account of

William Olson,

To A. M. Baker,
c/o Equity International Bank,
Fargo, N. D.

That draft with the stock was sent to the First National Bank of Fargo. Baker notified Lee, and he at once gave his check and took up the draft and the stock. Olson claims that he signed the draft without reading it, and that he never agreed to sell the stock for less than \$125 a share, and interest. It is quite possible there may have been a mistake, and that the deal might have been rescinded. But this is not an action to rescind. It is an action based on a contract with Lee. Let us examine the evidence:

As Lee testifies, on January 7th, he said to Baker that he would take the stock at \$125 a share if he could get it before the meeting; but he did not get it. Then, on the evening after the meeting, Baker told him that Olson offered his stock for sale at par and 7 per cent. (98)

Q. What did you say?

A. I said I would take it at that price. I had noticed Baker and Olson in conversation together.

Q. It was after the conversation that Baker talked with you?

A. Yes, sir.

Q. Did you consider par and 7 per cent a fair value for the stock?

A. I did.

Q. Did you at any time have any conversation with Olson with reference to buying the stock?

A. I never did.

An offer was made to show that at the time of the meeting the book value of the stock was \$119 a share. An offer was made to show that, after the meeting Lee purchased from the cashier of the First National Bank of Freemont ten shares of the stock at \$100 a share. Defendant Lee testified the bank was organized about a year and four months before the annual meeting in January, 1918, and during that time it had been losing money. Baker testifies that at the annual meeting of the stockholders on January 10, 1918, Olson was a candidate for director. There were other candidates on the same ticket with him. He says: "After the meeting Olson called me aside and wanted to know if I could find a purchaser for his stock. Olson said he had all he wanted. I asked him if he had gotten my letter, and he said, 'No.' And I said what do you want for the stock now? He said he wanted par and 7 per cent. I says I think I can dispose of it for you. Then I saw Mr. Lee and quoted him the stock at par and 7 per cent, and he said he would take it." (77)

It appears the draft, with the stock, was sent to the First National Bank of Fargo. Lee paid the draft and the collection charges, \$5.50. The par value of the stock was, \$5,000; the interest at 7 per cent for one year, four months, and two days was, \$468.61; the draft was for \$5,468.61, and it was paid, with collection charges, \$5.50. Olson must have told his banker to figure interest on \$5,000. The draft is a very short and plain document. Olson is a business man. It is hard to conceive how he could sign the draft without seeing the amount and knowing that it was not equal fifty times \$125, or \$6,250, with interest. The record shows not a scintilla of evidence to charge Mr. Lee with an express or implied contract to pay for the stock more than the sum actually paid. It does not show that the stock was worth more

than the sum paid. The court should have directed a verdict in favor of the defendant for a dismissal of the action.

Reversed and dismissed.

CHRISTIANSON, Ch. J., and BIRDZELL, J., concur.

BRONSON, J. I concur in the result.

GRACE, J. I dissent.

FARMERS' STATE BANK of Hatfield, Minnesota, Respondent, v.
EUGENE COUTURE and Rolette County Bank, Fred E. Harris, as its Receiver, Appellants.

(178 N. W. 138.)

Banks and banking — lack of authority of officer rediscounting paper held no defense against a purchaser without knowledge.

In an action on a promissory note which the plaintiff bank had discounted for the defendant bank, where it appeared that the defendant bank was operated under the management of its president who indorsed the note and who, together with the cashier, guaranteed payment and agreed to repurchase after maturity, the defendant bank defended on the ground that the officers referred to did not have authority to rediscount paper of the bank. It is held:

Though the officers of a bank may not have actual authority to rediscount paper by reason of limitations in the by-laws and in the regulations of the State Banking Board limiting the power of banking institutions to contract debts, where it is shown that the stockholders and directors of the bank allow the institution to be run by an officer who is accustomed to transacting all the ordinary business of the bank, and where such officer contracts for a rediscount of paper belonging to the bank, drawing a draft therefor in favor of the bank which is later paid, the bank and its receiver are precluded from asserting the lack of authority of such officer as against a purchaser of the paper who took without knowledge of the limitations or without knowledge of the facts which would make the limitations operative.

Opinion filed May 20, 1920.

Appeal from district court, Rolette County, Honorable *C. W. Butts*, Judge.

Affirmed.

Fred E. Harris, for appellant.

T. J. Clifford, as president of the defendant bank, was not authorized to bind the bank by an unrestricted indorsement.

The officers of the bank had no authority to guarantee payment by unrestricted indorsement. 5 Cyc. 467, 468, 470, 477; *Asher v. Sutton* (Kan.) 1 Pac. 535; *Greenwalt v. Wilson* (Kan.) 34 Pac. 403; *Sponberg v. First Nat. Bank* (Idaho) 31 L.R.A.(N.S.) 736; Comp. Laws 1913, § 6337.

State banks are under the control of and subject to the regulations of the state banking board, and acts which are contrary to the regulations of such board are void. Comp. Laws 1913, § 5146, 5150; *State ex rel. Goodsill v. Wodmanse*, 1 N. D. 246, 46 N. W. 970.

An officer of a state bank has no power to borrow money for the bank without being specially authorized by the directors. *First Nat. Bank v. Michigan City Bank*, 8 N. D. 608, 80 N. W. 766.

The authority of the president of the bank must be shown in order to bind the bank. *Bobson v. Moore* (Ill.) 45 N. E. 243; *People's Bank v. Church of Brooklyn*, 17 N. E. 408; *First Nat. Bank v. Drake* (Kan.) 11 Pac. 445; *Asher v. Sutton* (Kan.) 1 Pac. 535; *Greenealt v. Wilson* (Kan.) 34 Pac. 403; *Schneitman v. Noble* (Iowa) 29 N. W. 224; *McLellan v. Detroit File Works* (Mich.) 23 N. W. 321; *Security Bank v. Kingland*, 5 N. D. 263, 65 N. W. 697; *Baldwin v. Canfield* (Minn.) 1 N. W. 261; *Edwards v. Carson Water Co.* (Nev.) 34 Pac. 381; *Kraniger v. People Bldg. Soc.* (Minn.) 61 N. W. 904.

Pollock & Pollock, for respondents.

A bank may borrow money. *Auten v. Bank*, 174 U. S. 124, 43 L. ed. 920; *Aldrich v. Bank*, 176 U. S. 618, 44 L. ed. 611; *Bank v. Bank*, 15 N. D. 596; *Bank of Portage v. St. Bank Northwood*, 15 N. D. 594.

Bank officers have all the power of a board of directors and can do whatever they can do, or authorize to be done and have the full power of a banking corporation with respect to the conduct of the business. *Armstrong v. Bank*, 63 Fed. 558; *Tourtelet v. Whitehead*, 9 N. D. 407; *Davenport v. Stone*, 62 N. W. 722; *Wing v. Bank*, 61 N. W. 1009.

It is the duty of the directors to know of the transactions of its officers and they are chargeable with knowledge thereof. *Marden v. Webb*, 110 U. S. 7, 28 L. ed. 49; *Mahoney Min. Co. v. Bank*, 104 U. S. 192, 26 L. ed. 707; *Aldrich v. Bank*, 176 U. S. 618, 44 L. ed. 611; *Bank v. Bank*, 15 N. D. 596.

The usages of business in a particular institution or locality may be considered in determining an officer's power. *Auten v. Bank*, 174 U. S. 124, 43 L. ed. 920.

It is to be presumed that the officers had the power to make such guaranty in the name of the bank and the bank is estopped to deny it. *People's Bank v. Municipal Mfg. Co.'s Bank*, 101 U. S. 181-184, 25 L. ed. 907. This action is based on similar facts and the statutes seem to be almost identical. See also *Comp. Laws 1913*, § 5150.

A bank cannot deny its power to secure its loans, the proceeds of which it has received, so long as it retains such proceeds. *Wright v. Hughes*, 21 N. E. 906; *Tourelot v. Whitehead*, 9 N. D. 407; *Day v. Spiral Spring Buggy Co.* 23 N. W. 628; 10 Cyc. 1150, 1151; *Anthony v. Household Sewing Mach. Co.* 5 L.R.A. 575; *First Nat. Bank v. St. Bank Northwood*, 15 N. D. 594.

Acceptance of benefit is a consent to obligation. *Comp. Laws 1913*, § 5866; *Bank of Knox v. Bakken*, 17 N. D. 224; *Bank v. Bank*, 8 N. D. 608.

BIRDZELL, J. This is an action by the Farmers' State Bank of Hatfield, Minnesota, against the defendants on a promissory note which was given by the defendant Couture to the Rolette County Bank and by it rediscounted with the plaintiff bank. The note in question was executed on January 14, 1918, and called for the payment of \$1,300 on December 1, 1918, with interest at 10 per cent. It was indorsed in blank by the Rolette County Bank, by T. J. Clifford, president, and in addition a separate guaranty of payment and repurchase agreement, signed by Clifford, as president, and M. Scott, as cashier, was entered into. The note was forwarded to the plaintiff and a draft was drawn to cover the purchase price of this and other notes, which draft was paid on presentation. A jury was waived and the action was tried before the district judge who entered a judgment in favor of the plain-

tiff. From this judgment the defendant bank and its receiver have appealed.

The appellant's contentions concern only the authority of Clifford, the president of the bank, to rediscount the paper and to enter into the guaranty and repurchasing agreement. It is not seriously contended by the respondent that Clifford had actual authority to rediscount this paper, as it appears that the matter was never referred to the discount committee in accordance with the controlling regulations.

It is also pointed out that under the regulations of the State Banking Board a rediscount of this character is considered a loan, and that the bank was so heavily indebted at the time that the loan in question was in excess of its authority to borrow. It is not shown, however, either that the books of the bank disclosed this condition or that the plaintiff had any knowledge thereof.

But the absence of actual authority is not conclusive against the plaintiff, provided Clifford and Scott, president and cashier, respectively, of the bank, possessed ostensible authority to bind the bank by the contract of discount, indorsement and guaranty. The appellant, however, argues that under the rule laid down in the case of *First Nat. Bank v. Michigan City Bank*, 8 N. D. 608, 80 N. W. 766, the defendant cannot be held liable on any principle of estoppel or ostensible authority. The argument seems to us untenable for it carries the principle of the case beyond the facts to which it was applied and fails to take into account the subsequent expressions of the court on the same subject.

It is unnecessary to emphasize the features of the present case which distinguish it from that of the *First Nat. Bank v. Michigan City Bank*, supra. Suffice it to say that the notes which were rediscounted in that case were forgeries as to the makers, whereas in the instant case there is no question of the genuineness of the note nor of the further fact that the defendant bank received from the plaintiff bank full value for the paper. In this case it further appears that the bank was practically in the charge of Clifford and that the directors exercised very little, if any, control. These facts clearly relieve the case from the operation of the principle upon which ostensible authority was denied in the case of *First Nat. Bank v. Michigan City Bank*, supra, and bring it within a principle that has been repeatedly asserted, not only in this

state but in other jurisdictions including the Supreme Court of the United States, upon whose authority the case of *First Nat. Bank v. Michigan City Bank* was decided. At the time of the first decision upon this question (*First Nat. Bank v. Michigan City Bank*) this court was impressed with the then latest authoritative expression—that of the Supreme Court of the United States—found in *Western Nat. Bank v. Armstrong*, 152 U. S. 346, 38 L. ed. 470, 14 Sup. Ct. Rep. 572, which was deemed particularly persuasive by reason of the similarity between the provisions of the national banking act there under consideration and the state banking laws. But in later decisions, the United States Supreme Court has plainly limited the effect of its former holdings (see *Aldrich v. Chemical Nat. Bank*, 176 U. S. 618, 44 L. ed. 611, 20 Sup. Ct. Rep. 498) and has pointed out that the principle of the *Armstrong* case does not apply where the defendant bank gets the benefit of the money loaned to it. In the *Aldrich* case the question was substantially the same as in the case at bar. After analyzing the facts, the court stated the question thus (176 U. S. p. 629):

“We have then a case in which a national bank having used in its business money which its vice president obtained as a loan to it from another national bank denies all liability to account for the same upon the ground that the loan was not negotiated by it or by its directors, as well as upon the ground that it could not itself have legally borrowed the money from the other bank. Do the statutes relating to national banking associations require that such a defense be sustained?

After discussing authorities at length, the court answered this query as follows (page 635):

“Without further citation of cases we adjudge, both upon principle and authority, that as the money of the *Chemical Bank* was obtained under a loan negotiated by the vice president of the *Fidelity Bank* who assumed to represent it in the transaction, and as the *Fidelity Bank* used the money so obtained in its banking business and for its own benefit, the latter bank, having enjoyed the fruits of the transaction, cannot avoid accountability to the *New York bank*, even if it were true, as contended, that the *Fidelity Bank* could not consistently with the law of its creation have itself borrowed the money. . . . It cannot escape liability on the ground merely that it was not permitted by its charter to obtain money from another bank. . . . It would not be

allowed to hold the money, even if it were not without power under its charter to have borrowed it from the Chemical Bank for use in its business. . . .”

See also *First Nat. Bank v. State Bank*, 15 N. D. 594, 109 N. W. 61; *First Nat. Bank v. Bakken*, 17 N. D. 224, 116 N. W. 92; *Grant County State Bank v. Northwestern Land Co.* 28 N. D. 479, 512, 150 N. W. 736; *Davenport v. Stone*, 104 Mich. 521, 53 Am. St. Rep. 467, 62 N. W. 722; *Merchants Nat. Bank v. State Nat. Bank*, 10 Wall. 604, 19 L. ed. 1008; 1 Morse, *Banks & Bkg.* 5th ed. §§ 160, 165.

The repurchase agreement imposed no greater liability on the defendant than an ordinary indorsement with a waiver of presentment, demand, and notice; and if the bank is precluded from relying upon the absence or limitation of authority on the part of its officers to borrow money under a contract of indorsement with waiver, it is equally precluded from denying the authority to enter into the contract of repurchase.

The judgment appealed from is correct and it is affirmed.

CHRISTIANSON, Ch. J., and BRONSON, and ROBINSON, JJ., concur.

GRACE, J. I concur in the result.

EBENEZER MAGOFFIN, as Administrator of the Estate of Nellie A. Maxwell, Deceased, Appellant, v. VERA N. WATROS, a Minor, by T. L. Brouillard, her Guardian ad Litem, Respondent.

(178 N. W. 134.)

Deeds — whether grantor depositing deeds with scrivener, intended to part with control, held a question of intent.

1. Where deeds are executed and left with a scrivener, accompanied with the statement that the grantor wanted the same recorded, if anything happened to her, the question of a constructive delivery thereof to the grantee

NOTE.—On delivery of deed to third person or record by grantor, as a delivery to the grantee, see notes in 54 L.R.A. 865; 9 L.R.A.(N.S.) 224; and 38 L.R.A.(N.S.) 841.

named is a question of fact, to be determined from the evidence whether the grantor deposited such deeds with a stranger and with intent to part with all control and dominion thereover.

Deeds — grantee asserting title held to have burden of proving constructive delivery.

2. The burden is upon the grantee, asserting the title, to prove such constructive delivery, and upon failure so to establish, by proof, the deeds will be adjudged invalid for want of delivery.

Executors and administrators — administrator may sue to determine adverse claims.

3. The administrator, as the representative of the estate of the deceased, has authority to maintain an action to determine adverse claims concerning the possession, the interest, or the title of the estate therein.

Opinion filed May 20, 1920.

Action to determine adverse claims, in District Court, Dickey County, *Graham, J.*

The plaintiff has appealed from the judgment rendered quieting title, in part of the lands, in the estate, and, in another part, in the defendant, and has demanded a trial *de novo*.

Affirmed in part and reversed in part.

Statement by *Bronson, J.* This is an action to determine adverse claims. The plaintiff is the administrator of the estate of *Nellie A. Maxwell*, deceased. The defendant is the infant daughter of the deceased.

On November 19th, 1914, the mother executed two warranty deeds, her daughter being named therein as grantee. The only testimony concerning the execution and the delivery of such deeds is in the form of an affidavit, stipulated into the record by the parties. It reads as follows:

"G. L. Strobeck being first duly sworn on his oath says that he is a citizens of the United States and over the age of twenty one years. That on the 19th day of November A. D. 1914, *Nellie A. Watros*, being the same person above named as *Nellie A. Maxwell*, deceased came into my bank at *Cogswell*, *Sargent county*, *North Dakota*, and requested me to draw two deeds, one for the north half of section nine township, 130 north of range 56 *West Sargent county North Dakota*, the other for lots

1, 2, 3, 4 of block six of Campbell's addition to the village of Cogswell, in said county, which I then and there did, and at her request named as grantee in each of said deeds her daughter, Vera N. Watros; she telling me at the time and occasionally thereafter that if anything should happen to her that she wanted the deeds recorded. Said deeds remained in the files of the Cogswell State Bank of Cogswell, North Dakota, from aforesaid drawing until after her death. Then they were delivered to the administrator of her estate."

On September 24, 1918, the mother executed two other warranty deeds with the daughter named as grantee therein. The only testimony concerning the execution and the delivery of such deeds is likewise in the form of an affidavit, stipulated by the parties into the record. It reads as follows:

"F. B. Dille, being first duly sworn on his oath, says that he is a citizen of the United States and over the age of twenty-one years. That on the 24th day of September A. D. 1918, Nellie A. Maxwell, formerly Nellie A. Watros, came to my bank at Monango, North Dakota, and requested me to draw for her two deeds conveying to her daughter, Vera N. Watros, the northwest quarter and the southwest quarter of section 5 in twp. 131 north of range 63 west, in Dickey county, North Dakota, which I then did then and there and at her request. She at that time left said deeds with me without any instructions at all as to their disposition. Said deeds remained in the files of the Farmers & Merchants State Bank of Monango, North Dakota, from aforesaid drawing until after her death. Then they were delivered to the administrator of her estate."

It was further stipulated between the parties that no consideration was ever given by the grantee or anyone else for such deeds; that the daughter never had any knowledge of the existence of such deeds until after the death of her mother; that the mother was the owner and in possession of the real property described therein; that the daughter never was in actual possession of any such real property, never received any rents or profits therefrom, and never paid any taxes thereon. The record facts accordingly are entirely stipulated; they are not in dispute. The trial court, upon findings, rendered judgment decreeing the estate of the mother to be the owner of the two quarter sections of land situated in Dickey county, and the daughter to be the owner of the half section

of land in Sargent county and the four lots in the village of Cogswell.

At first the plaintiff appealed from that part of the judgment decreeing ownership of the lands in the daughter. Thereafter an appeal was perfected from the entire judgment and the same has now been submitted to this court upon the appeal from the entire judgment. The plaintiff has demanded a trial anew in this court. The sole question involved is whether there was a delivery of the deeds so executed. The trial court has found that there was a delivery of the deeds executed in 1914, but no delivery of the deeds executed in 1918.

Benjamin Porter, and W. S. Lauder, for appellant.

Where a deed is found in the possession of the grantor, the presumption is, in the absence of evidence to the contrary, that it has not been delivered. 13 Cyc. 733; *Shetler v. Stewart*, 133 Iowa, 320, 170 N. W. 310; 110 N. W. 582; *Wilensou v. Handlon*, 208 Ill. 104, 69 N. E. 892.

When a deed unrecorded, is found in the possession of a defendant grantor, the burden of proof is on the plaintiff claiming title under such deed to show a delivery. 13 Cyc. 730; *Devaney v. Koyne*, 54 Mich. 116, 19 N. W. 772; *Tyler v. Hall*, 106 Mo. 313, 27 Am. St. Rep. 338, 17 S. W. 319.

T. L. Brouillard, for respondent.

BRONSON J. (after stating the facts as above). The question of the delivery of the deeds is a question of intention. *Devlin, Deeds*, 3d ed. §§ 262, 308; *O'Brien v. O'Brien*, 19 N. D. 713, 715; 125 N. W. 307; *Hudson v. Hudson*, 287 Ill. 286, 122 N. E. 500. This is a question mainly of fact. *Devlin, Deeds*, §§ 262, 308; *O'Brien v. O'Brien*, 19 N. D. 713, 125 N. W. 307. The legal principles applicable are not seriously in dispute. It has been held by this court that a deed delivered to a third person to be delivered after the grantor's death, operates as a valid delivery and present transfer of title, if made with the intent that all control and dominion thereover terminates at the time of such delivery. *O'Brien v. O'Brien*, 19 N. D. 713, 716, 125 N. W. 307; *Arnegard v. Arnegard*, 7 N. D. 475, 495, 41 L.R.A. 258, 75 N. W. 797. See 18 C. J. 208.

Section 5500, Comp. Laws 1913 (so far as applicable) provides that, though a grant is not actually delivered into the possession of the grantee, it is yet to be deemed constructively delivered when it is de-

livered to a stranger for the benefit of a grantee, and his assent is shown or may be presumed.

The facts in this record are indeed meager. The record fails to disclose the relationship of the depositaries. Strobeck and Dille, either to the deceased or to the daughter. Whether such persons were agents of the deceased, agents of the daughter, or strangers, must be left entirely to inferences and presumption. There is no proof nor contention that the depositaries were the agents of the daughter, and no contention accordingly is made that actual delivery was in fact made to the daughter or her agents. If the depositaries were agents of the deceased, there was no constructive delivery by reason of the absence of proof of any agreement of the parties therefor, pursuant to subdivision 1, § 5500, Comp. Laws 1913.

Accordingly, if there exists any delivery in law, it must exist by reason of a constructive delivery made to the depositaries as strangers, or third parties, pursuant to § 5500, Comp. Laws 1913, above quoted. It is the contention of the respondent daughter, concerning the 1914 deeds, that there is disclosed an intent to make delivery based upon the authority of *Arnegard v. Arnegard*, 7 N. D. 475, 41 L.R.A. 258, 75 N. W. 797; *Bury v. Young*, 98 Cal. 446, 35 Am. St. Rep. 186, 33 Pac. 338; and *Cooper v. Cooper*, 162 Mich. 304, 127 N. W. 266.

In *Arnegard v. Arnegard*, supra, the motive and intention of the grantor were more clearly shown. In that case the scrivener, the cashier of the bank, testified that the grantor stated that he desired his boys to have the property and he wished to deed it to them; that the grantor said he did not know anything about wills but that he did know something about deeds and mortgages and he preferred to have it deeded; that he delivered the deeds over to the cashier, requesting him to take them and hold them, and in case of the grantor's death to put them on record; and he requested the cashier to say nothing to anybody, about his having deeded this property. Furthermore in this case the trial court made a finding (not in trying the case anew under the Newman Act), held finding in favor of actual delivery and this court, upon reviewing such that it would not disturb the same unless it appeared to be clearly erroneous. Accordingly the finding of actual delivery was upheld. Likewise in *Bury v. Young*, supra, the deed was executed from father to daughter and was given to one Hazen, an attorney, with instructions

not to record it but to deliver it to the grantees upon his death. The trial court made a finding that the grantor delivered such deed to Hazen for the grantees and instructed him to hold the same for such grantees without recording until the grantor's death, and thereupon to deliver the same to the grantee; that such grantor parted with all dominion over the deed and reserved no right to recall it or alter its provisions or to have or enjoy any other interest in the premises than to hold the use of it until his death. The appellate court held that these facts as stated, and found, in the findings constituted a valid delivery of the deed.

In *Cooper v. Cooper*, supra, the grantor executed deeds to his sons and placed them in a sealed envelope, indorsed with the names of the grantees. On his way home from the scrivener he left this envelope with a friend and said: "Keep these papers until the boys call for them." Subsequently, he committed suicide. The sheriff found and delivered a letter addressed to this friend which said: "I wish you would take these papers and have them recorded immediately; by so doing you will greatly oblige." The friend, as requested caused the deeds to be recorded. It was held that these circumstances sufficiently showed an intent to convey a present irrevocable interest to the grantees.

These cases relied upon by the respondent can be distinguished from the record facts in this case, as may be noted from the statement of facts made concerning the same.

In *O'Brien v. O'Brien*, supra, one Burke drew a deed for the mother naming her son as grantee therein. He received instructions from the mother to hold the deed until her death and then deliver it to the son. He testified that he made a memorandum at the time and this memorandum stated; "This deed was left with W. J. Burke to be held by him until the death of Johanna O'Brien, grantor, at which time it is to be delivered to J. T. O'Brien, the grantee." Thereafter Jeremiah O'Brien came to Burke stating that his mother was sick and about to die and that she had requested him to get the deed. The deed was so given. This court held:

"The record does not satisfactorily show the circumstances attending the execution and delivery of the deed to Burke. The language used by the grantor is not given. The evidence as to what occurred is more by way of the conclusions of Burke. The evidence is entirely wanting as to her intent in respect to the right to recall the deed, and as to whether

Burke's authority to deliver the deed was absolute and without conditions, except as these matters may be inferred from the very general statements that the deed was to be delivered to the plaintiff upon the grantor's death. Burke's testimony may be entirely true, and still the grantor have reserved the right to recall the deed under some circumstances. It is incumbent upon the plaintiff to show that the deed was delivered without any reservations. The burden is upon him to show title to the land by virtue of the deed, and this he could not do without showing an absolute and unconditional delivery thereof."

Similarly, in this case, it was incumbent upon the respondent daughter, asserting title, to show that the deeds were constructively delivered, with an intent to part with the dominion and control over the same. It was further necessary to accomplish such constructive delivery to show that the deeds were deposited with a stranger, or, such facts and circumstances from which it might be inferred that the depository was a stranger. Clearly, the deeds deposited with Dille, in 1918, without instructions, were not constructively delivered to the grantee. We are unable to find and hold upon this record that the deeds left in 1914 with Strobeck, with the grantor's statement that she wanted the deeds recorded if anything should happen to her, operated to constructively deliver such deeds to the grantee as a deposit with a stranger and with the intent to part with all control and dominion thereover.

Upon the oral argument, the question of the right of the administrator to maintain this action was raised through a member of this court. We are entirely satisfied that an administrator may maintain an action to determine adverse claims under the law and procedure of this state. An administrator in this state is entitled to the possession of all the property of the deceased excepting the homestead and other exempt property. Comp. Laws 1913, § 8707. He may sell and convey the real estate, under certain circumstances. Comp. Laws 1913, §§ 8767-8779. The heirs in this state, during the course of administration, do not have the sole control, nor the right of possession of the real estate of the deceased. *Honsinger v. Stewart*, 34 N. D. 513, 518, 159 N. W. 12. Furthermore, the administrator is expressly authorized by statute to maintain an action to recover any property, real or personal, or for the possession thereof. Comp. Laws 1913, § 8798. The fact that § 8797, Comp. Laws 1913, permits the heirs themselves, or jointly with the

administrator, to maintain an action to quiet title, does not deny the right alone to the administrator so to do. Assuredly, where the possession or determination of the title to the real estate of the deceased is necessary for purposes of administration, the administrator, as representative of the estate, possesses an interest sufficient to entitle him to maintain an action to determine adverse claims. See Comp. Laws 1913, § 8144; *Blakemore v. Roberts*, 12 N. D. 394, 96 N. W. 1029; *Druey v. Baldwin*, 41 N. D. 473, 172 N. W. 665, 182 N. W. 700; *Honsinger v. Stewart*, *supra*; *Berry v. Howard*, 26 S. D. 29, 127 N. W. 526. See note in *Ann. Cas.* 1913A, 996.

The judgment of the trial court should provide for the quieting of title in the lands involved in the heirs at law of the deceased, and in the administrator for purposes of administration. *Druey v. Baldwin*, 41 N. D. 473, 172 N. W. 665, 182 N. W. 700.

It is ordered that judgment be entered declaring the deeds involved void and quieting title in the lands concerned in the heirs at law of the deceased, and in the administrator of the estate for purposes of administration. Neither party shall recover any costs on this appeal.

CHRISTIANSON, Ch. J. and BIRDZELL and GRACE, JJ. concur.

ROBINSON, J. (concurring in part). This is a second appeal by the administrator. He brings suit as administrator of Nellie Maxwell, deceased, mother of the defendant. The purpose of the action is to quiet title to certain land in Dickey county and in Sargent county, which defendant claims under a deed from her mother. On stipulation made by counsel, showing clearly that the deed had not been delivered, the court gave judgment thus:— That the estate of Nellie Maxwell is the owner of the land in Dickey county, and that the defendant has no estate or interest in the same. That defendant is the owner of the estate in Sargent county and that her title be quieted and confirmed. The administrator appealed from the latter part of the judgment, and the appeal was dismissed on the ground that it could not be taken from a part of the judgment. Then the administrator appealed from the whole judgment and the case comes to this court for a new trial.

Though the point is not made by counsel for defendant, it does appear that she is the daughter and the heir of her deceased mother and

it does not appear that there are any other heirs or any claims against the estate, or that this action has any purpose, except to make costs and attorneys' fees.

So far as the record shows the plaintiff is the sole heir of her mother, and there are no claims against the estate. On the record there is no showing of any occasion for the administrator to bring this action, unless it be to exploit the estate. If there be other heirs, they have a right to settle any question of difference or adverse claims between themselves. It is of no concern to the administrator. That is plain common sense, and it is plainly shown by the words of the statute:—

Section 8797. The heirs may themselves, or jointly with the executor or administrator, maintain an action to quiet title to real property.

Section 8798. Except as otherwise prescribed in the next (preceding) section, all actions pertaining to the estate of the deceased may be maintained by and against executors and administrators.

Section 7899. No action for the recovery of money only shall be brought in any of the courts of this state against any executor or administrator or guardian upon any claim or demand which may be presented to the county court, except as provided in this chapter.

This last section is quoted to show that its purpose is merely to limit the bringing of actions against executors and administrators—actions for the recovery of money only—and it does not relate to actions by administrators, nor actions to quiet titles. It is not the next section to which reference is made by § 8798. By that section the administrator is given plenary power to maintain all actions against the estate, except as prescribed in the next preceding section. Surely the courts may not disregard or annul that exception which is based on plain words, reason, and good sense. In the opinion to the contrary reference is made to *Blakemore v. Roberts*, 12 N. D. 394, 96 N. W. 1029. But that case is not in point, because it was by Robert Blakemore, executor, and by Laura B. Kedney, who was the wife of the deceased. Here there is no claim that the plaintiff is an heir of the deceased. There is no showing that as administrator, or otherwise, he has the least interest in the subject of the action. The judgment from which the appeal is taken declares that the estate of *Nellie Maxwell* is the owner of the land in Dickey county and that the defendant has no estate or interest in the same. Now, on any theory of the case, that is manifestly erroneous.

The estate of Nellie Maxwell is not a personal entity; it is neither a corporation nor a person; it is not a party to this action and it cannot recover any judgment. If the deed to the defendant is void for want of delivery, it does not change the conceded fact that she is the daughter and the heir of her deceased mother, who died intestate, and as such heir defendant must have an interest in the estate.

The appeal presents no merits. It should be dismissed, without costs, in the same manner as the prior appeal was dismissed. But, if a majority of the court desire to pass on the merits of the case, the judgment against the defendant should be only that the deed made to her is void for want of delivery. It should not go further and declare that she has no title or interest in the property, and it should be without costs.

HENRY TUVESON, Appellant, v. OLE C. OLSON, Karel Olson
and Scandinavian American State Bank, a Corporation, Respondents.

(178 N. W. 281.)

Sales—evidence held not to establish buyer's alleged rescission of sale.

Plaintiff seeks to cancel a note and mortgage given for a threshing outfit. He claims that he rescinded the sale on the ground of a breach of warranty by the seller. For reasons stated in the opinion, it is held that the plaintiff has failed to establish a rescission of the sale.

Opinion filed May 20, 1920.

From a judgment of the District Court of Mountrail County, *Leighton, J.*, plaintiff appeals.

Modified and affirmed.

F. F. Wykoff, for appellant.

The right to rescind a contract for breach of warranty is a question upon which the courts are not entirely in harmony, but in this state the rule is well established that such rescission may be made. 24 R. C. L. 287 and cases cited; *Minn. Thresh. Mfg. Co. v. Hanson*, 3 N. D. 81; *Canham v. Plano Mfg. Co.* 3 N. D. 229; *Emerson-Brantingham Improv. Co. v. Busch* (N. D.) 175 N. W. 201; *Comp. Laws* 1913, § 5934.

Where a bank discounts paper for a depositor and gives him credit upon its books for the proceeds of the paper, it is not a bona fide holder

for value, so as to be protected against infirmities in the paper, unless, in addition to the mere fact of crediting the depositor with the proceeds of the paper, some other valuable consideration passes. 3 R. C. L. 1055; *McNight v. Parsons*, 136 Iowa, 390, 22 L.R.A. (N.S.) 718, 15 Ann. Cas. 665; *Manufacturers Nat. Bank v. Newell* (Wis.) 37 N. W. 420; *Bank v. Huver*, 114 Pa. 216; *Daugherty v. Bank*, 93 Pa. 227; *Dresser v. Railroad Co.* 93 U. S. 92; *Scott v. Bank*, 23 N. Y. 289; *Bank v. Valentine*, 18 Hun, 417; *Mann v. Bank*, 30 Kan. 412, and many other authorities.

Clinton Cottingham (*F. J. Funke*, of counsel), for respondents.

Where the goods have been delivered to the buyer, he cannot rescind the sale if he knew of the breach of warranty when he accepted the goods, or if he fails to notify the seller within a reasonable time of his election to rescind. Sess. Laws 1917, chap. 202, § 12.

CHRISTIANSON, Ch. J. On the 11th day of May, 1918, the defendants Ole C. Olson and Karel Olson, sold and delivered to the plaintiff a certain threshing outfit consisting of an engine, separator, and cook car. For this, plaintiff gave his promissory note for \$1,400, dated on that day, payable August 1, 1918. To secure said note the plaintiff executed and delivered a certain so-called "preliminary" real estate mortgage upon a quarter section of land in Mountrail county, which the plaintiff had entered, and was then occupying, under the homestead laws of the United States of America; but upon which final proof had not been made. On February 28, 1919, the plaintiff instituted this action to quiet title. In his complaint he averred that he had an interest in said premises "by virtue of a homestead entry under the laws of the United States." The defendants in their answer set up the facts relating to the execution and delivery of said promissory note and mortgage, and averred such mortgage to be a lien on the premises. The plaintiff in his reply averred that the note and mortgage had been given in payment of a threshing machine outfit which the plaintiff had purchased from defendants; that said defendants had warranted the outfit to be first class machinery, in good order, which would do good threshing; that it was free from all liens and mortgages; that in truth and fact neither the engine nor the separator were first class machinery or in good order; that the engine was worn out, the boiler leaking, and

bolts therein loose, and that it was unfit for use, and in such condition that it could not be repaired; that the separator was worn and the wheels and pulleys thereon loose; that both the engine and separator were worn out, and could not be put in good working condition; also, that there were chattel mortgages against said outfit. The case was tried upon the issues thus framed, and resulted in findings and judgment in favor of the defendants that the mortgage was a valid lien upon the premises. The plaintiff has appealed and demanded a trial anew in this court.

We have the gravest doubts as to whether an action to determine adverse claims is maintainable by the plaintiff in this case. This is not an action to enforce the possessory rights of a homestead entryman, but an action to remove the lien of a certain mortgage upon premises, the title to which is in the United States government, and which may never become vested in the plaintiff at all. See *Jackson v. La Moure County*, 1 N. D. 238, 241, 46 N. W. 449. The question as to the right to maintain such action was not raised, however, either in the court below or in this court; but the parties tried the case on the theory that the only question was whether the plaintiff was entitled to judgment canceling the note and mortgage. At all events plaintiff's cause of action is bottomed upon the contention that he rescinded the contract of purchase on the ground of breach of warranty. He concedes that he can in no event prevail in this case unless he has shown that he rescinded the contract of purchase.

Our statute provides:

"(1) Where there is a breach of warranty by the seller; the buyer may, at his election— . . .

"(2) Rescind the contract to sell or the sale and refuse to receive the goods, or if the goods have already been received, return them or offer to return them to the seller and recover the price or any part thereof which has been paid.

"(3) Where the goods have been delivered to the buyer, he cannot rescind the sale if he knew of the breach of warranty when he accepted the goods, or if he fails to notify the seller within a reasonable time of the election to rescind, or if he fails to return or to offer to return the goods to the seller in substantially as good condition as they were in at the time the property was transferred to the buyer. But if deteri-

oration or injury of the goods is due to the breach of warranty, such deterioration or injury shall not prevent the buyer from returning or offering to return the goods to the seller and rescinding the sale." (Laws 1917, chap. 202, § 69.)

As stated, the deal between plaintiff and defendants was made May 11, 1918. At that time the threshing outfit was on the premises of the defendants Olson. The plaintiff did not take or receive it into his possession at the time the deal was made but left it where it then was. On June 19, 1918, he wrote the defendant Scandinavian-American Bank as follows: "I will now write you in regard to one note for \$1,400 and mortgage given by me in favor of Carl Olson and O. C. Olson. If you have not had any transaction with this party already, I will advise you not to have anything to do with them. I claim a defense on this note for fraud and misrepresentation, and if you have had any dealings with them in regard to this note before you get this letter kindly let me know the condition of the same that you had with them. They have tried already to loan money on this note and they may try to sell it, so you will know about it in case you see them." The threshing outfit was not moved over to plaintiff's place or actually delivered into his possession until sometime after July 5, 1918. He not only received it, but retained it and did some threshing with it that fall, and has never returned it to the defendants. The only testimony on the part of the plaintiff relating to any offer to return the outfit was that in the fall, during the threshing season, he told them "the thing wasn't the way they sold it" to him, and "asked if they would take it back." And they said "a sale was a sale and they didn't want to take it back."

We are of the opinion that the plaintiff has failed to establish a rescission under the above quoted statutory provisions. Hence it follows that the action must, in any event, be dismissed. We express no opinion as to whether the evidence establishes any warranty.

The trial court is directed to enter judgment dismissing the action, without prejudice to any rights the plaintiff may have to recover damages for breach of warranty.

ROBINSON and BIRDZELL, JJ., concur.

BRONSON, J. I concur in the dismissal.

GRACE, J. I dissent from the result arrived at by the majority opinion.

MISSOURI VALLEY GROCERY COMPANY, a Corporation,
Respondent, v. THOMAS HALL, as Secretary of State of the
State of North Dakota, Appellant.

(178 N. W. 193.)

Corporations — “entire capital stock” in statute relating to vote to increase of capital stock means entire issued or subscribed stock.

Subdivision 3 of § 4557, Comp. Laws of 1913, which requires a favorable vote of at least two thirds of the entire capital stock of a corporation to increase the capital stock, is construed and it is *held*, for reasons stated in the opinion, that the expression “entire capital stock” means the entire issued or subscribed stock, and not the entire authorized stock.

Opinion filed May 20, 1920.

Appeal from the District Court of Burleigh County, *Nuessle, J.*
Affirmed.

William Langer, Attorney General, and *Grant L. Martin*, Assistant Attorney General, for appellant.

Capital stock is the entire sum agreed to be contributed to the enterprise whether paid in or not. 40 Ga. 98; 24 N. J. L. 195; 1 Words & Phrases, 562; *Cooke v. Marshall*, 43 Atl. 314.

Sullivan & Sullivan, for respondent.

The capital stock of a corporation is the money contributed by the corporators to the capital, and is usually represented by shares issued to subscribers to the stock on the initiation of the corporate enterprise. 10 Cyc. 364; *Foot v. Creilick* (Mich.) 132 N. W. 473; *Stemple v. Bruin* (Fla.) 49 So. 151; *Tapscot v. Mexican Colo. River Land Co.* (Cal.) 96 Pac. 271.

The general rule is that capital stock means a stock actually subscribed for and issued. *Platt v. Munson*, 17 Hun, 475; *Carlington v. Gilbert*, 17 N. Y. 489; *Fisk v. Chicago, etc. R. Co.* 36 How. Pr. 20; *Green Point Sugar Co. v. Whiten*, 69 N. Y. 328; *Christianson v. Eno*, 106 N. Y. 97; *State v. St. Louis & S. F. R. Co.* 105 Pac. 688.

BIRDZELL, J. This is an appeal from a judgment of the district court of Burleigh county awarding a peremptory writ of mandamus directed to the secretary of state, requiring him to file and record a

certificate of increase of the capital stock of the plaintiff and respondent. The plaintiff is a domestic corporation and, prior to the proceedings looking toward the increase of its capital stock, its articles of incorporation provided that the amount of its capital stock should be \$250,000, divided into 2,500 shares of the par value of \$100 each. Of this amount 1,250 shares were subscribed and issued. Pursuant to § 4557, Comp. Laws 1913, a meeting of the stockholders was called and held for the purpose of increasing the capital stock from \$250,000 to \$500,000. At this meeting were represented 1,205 shares of the capital stock or an amount largely in excess of two thirds of the stock issued. All of the stock represented at the meeting was voted in favor of the proposed increase. Thereafter, a certificate of increase, properly executed, was tendered to the defendant, together with the legal costs and fees for filing. The defendant, however, refused to file the certificate on the ground that it did not show compliance by the corporation with subdivision 3 of § 4557, Comp. Laws 1913, which provides as follows: "At least two thirds of the entire capital stock, except as hereinbefore provided, must be represented by the vote in favor of the increase or diminution thereof." It is the contention of the appellant that the expression "entire capital stock" contained in the above statute means the entire *authorized* capital stock, whereas the respondent contends that it means the entire *subscribed* or *issued* capital stock.

The term "capital stock" seems in itself to be an ambiguous expression, as it may, under varying circumstances, refer to entirely different subjects of corporate ownership. It may be used, for instance, as describing the property of the corporation in which its capital is invested, and it may be used as referring to the actual stock which has been subscribed or paid in, or as referring to the potential or authorized stock. In a true sense, however, stock which is merely authorized has no real existence until actually issued or subscribed. See 14 C. J. §§ 499 to 504, inclusive. The usual method according to which a corporation acquires its business capital is by the sale of its stock; and as the stock is issued it represents, in the hands of the shareholder, his interest in the combined capital which the corporation employs in carrying on the business. The unsubscribed stock is not, in reality, *capital stock* of the corporation, for the reason that it has not been employed for the purpose of supplying capital. It is only potential capital stock and does

not become so actually until disposed of by the corporation according to law. 14 C. J. 1552.

Since the term "capital stock," is ambiguous, the statute in which it occurs must be so construed as to give to it the meaning which the legislature had in mind in employing it. In ascertaining the legislative intention in this connection, reference will be made to various provisions of the Constitution and statutes which seem to bear upon the question.

Section 138 of the Constitution provides that the stock of a corporation shall not be increased except in pursuance of general law, nor without the consent of the *persons holding* the larger amount in value of the stock, which consent must be first obtained at a meeting held after sixty days' notice. It is plain that the Constitution contemplates representation only by the issued stock, because it provides for obtaining the consent of the persons holding the stock. Unsubscribed and unissued stock is, of course, not held by any person. By § 4543, Comp. Laws 1913, directors are precluded from reducing or increasing the capital stock except as specially provided by law. And § 4557, which provides the procedure for increasing and diminishing capital stock, in providing for notice of meeting and voting, takes into consideration only the stockholders. So it would seem that no power is conferred upon anyone to represent unsubscribed stock. Section 4543 limits the power of directors in creating debts to the "subscribed capital stock," and § 4559, which provides for issuing bonds, requires the favorable vote of "at least two thirds of the entire capital stock," the expression "entire capital stock" being identical with that found in subdivision 3 of § 4557, governing the increase of capital stock. It would thus seem that if the contention of the appellant in regard to the meaning of the expression is correct, no corporation could issue bonds unless two thirds or more of its stock were first subscribed. The only possible alternative would be that the directors could vote the unsubscribed stock, which would lay the actual stockholders open to the possibility of having a majority of the board of directors voting a bond issue against the wishes of an overwhelming majority of the stockholders. It is inconceivable that the legislature contemplated any such possibility.

The identical expression occurs also in § 4561, which provides for the amending of articles of incorporation, in § 4563, which provides

for the changing of the corporate name, and in § 4564, which provides a method of changing the corporate headquarters. But yet in each of the three sections last referred to it is provided that the written consent of the "holders of three fourths of the capital stock or members" shall be as effectual to authorize the amendment or change as if a meeting were called and held. If the contention of the appellant is correct, a meeting to accomplish any of these purposes would be ineffectual unless two thirds or more of the stock had been issued and subscribed. But yet by obtaining the written consent of the holders of three fourths of the capital stock, though less than two thirds were issued, the same ends could be accomplished. It would seem to be very apparent that in these instances "the entire capital stock" means the entire issued or subscribed capital stock, and that the desired amendments or changes could be effected either by a two-thirds vote of such stock at a meeting or by the written consent of three fourths of such stock without a meeting. It is clear that the two methods are regarded as equivalents. In view of § 138 of the Constitution, it would be impossible for the legislature to dispense with such a meeting for the purpose of increasing the stock or indebtedness;—this alone sufficiently accounts for the absence of a three-fourths consent provision as an equivalent of a two-thirds vote at a meeting in the sections regulating indebtedness and stock increases. That the legislature contemplated only the issued or subscribed stock in the statutes above mentioned becomes all the more apparent upon referring to other articles in the chapter dealing with corporations in general. Referring to the subjects of dissolution and assessments, for instance, two-thirds of the stockholders or members are authorized to vote a dissolution of the corporation. It would be strange, indeed, if two-thirds might vote a dissolution but yet lack the power to adopt a simple amendment to the articles of incorporation. And stock may be sold for nonpayment of an assessment and the corporation may become the purchaser. In this event, by § 4583, the remaining stock is alone considered for purposes of election and voting at stockholders' meetings.

The meaning which we thus deduce from the statute is in no wise altered by the qualifying word "entire." This can mean only that the basis for computation of the vote must be the entire stock rather than the stock which happens to be represented at the meeting. In other

words, if the entire issued or subscribed capital should be 4,500 shares, it would require the favorable vote of at least 3,000 to accomplish any purpose for which a two-thirds vote of the entire stock is required. Whereas, in the absence of the word "entire" in the governing statute, the two-thirds requirement might be computed upon the number of shares actually represented at the meeting.

While authorities directly in point seem to be lacking, the adjudicated cases cited below tend to sustain the interpretation of the statute which we have adopted. *London & L. F. Ins. Co. v. Ludwig*, 86 Ark. 581, 112 S. W. 197; *Excelsior Water & Min. Co. v. Pierce*, 90 Cal. 131, 140, 27 Pac. 44; *Stemple v. Bruin*, 57 Fla. 173, 49 So. 151; *Foote v. Greilick*, 166 Mich. 636, 132 N. W. 473, 476; *Pratt v. Munson*, 17 Hun, 475; *Green Point Sugar Co. v. Whitin*, 69 N. Y. 328, 338; *Com. v. Lehigh Ave. R. Co.* 129 Pa. 405, 408, 419, 5 L.R.A. 367, 18 Atl. 414, 498; *Sturges v. Stetson*, 1 Biss. 246, 248, Fed. Cas. No. 13,568.

It follows from what has been said that the judgment appealed from is correct and it is affirmed.

CHRISTIANSON, Ch. J., and ROBINSON, J., concur.

GRACE, J. I concur in the result.

BRONSON, J., disqualified, did not participate.

HENRY GRABAU, a Minor, by Andrew Grabau, His Guardian, Appellant, v. WILLIAM PUDWILL and Mary Pudwill, Respondents.

(178 N. W. 124.)

Negligence — automobile driver's negligence as to gratuitous guest on running board held question for jury.

1. Where the evidence shows that a boy, fourteen years of age, climbed upon

NOTE.—For authorities discussing the questions of liability of owner or operator of automobile for injury to guest, see notes in 50 L.R.A.(N.S.) 1100; L.R.A.1916E, 1190, and L.R.A.1918C, 276.

the running board of defendants' automobile, and with their knowledge and implied consent remained thereon during a trip on a country road, for a distance of between 6 and 7 miles, when the automobile, at a curve in the road, left the road and collided with a wire fence, and one leg of the boy was so lacerated and torn, that it was required, later, to amputate the same, it was error for the trial court to direct a verdict for the defendants and to refuse to submit the question of defendants' negligence to the jury; and this, though there were no proof, against the defendants of active negligence.

Negligence—automobile driver's negligence as to boy on running board held question for jury.

2. In view of the youth of plaintiff, the nature of the acts causing the injury, and the attendant circumstances and conditions accompanying such acts, proof of which appears in the evidence, the question of defendants' negligence was one for the jury.

Opinion filed May 10, 1920.

Appeal from a judgment of the District Court of Burleigh County, Honorable *W. L. Nuessle*, Judge.

Reversed and remanded.

E. T. Burke, for appellant.

The defendants owed to plaintiff a duty that the ordinary common carrier owes to its guest. *Johnson v. Coey*, 237 Ill. 88, 21 L.R.A. (N.S.) 81 and note; *Routledge v. Rambler Automobile Co.* 95 S. W. 749; *Perkins v. Galloway* (Ala.) L.R.A.1916E, 1190; *Gresh v. Wanamaker*, 221 Pa. 28; *Burnham v. Central Automobile Exch.* (R. I.) 67 Atl. 429; *Jacobs v. Jacobs* (La.) L.R.A.1917F, 253, 74 So. 992.

It was negligence upon the part of the defendants to allow the boy to ride upon the running board of the car where he was exposed to danger. *Ward v. International R. Co.* 206 N. Y. 83; *Anderson v. City R. Co.* 42 Or. 505; *Henderson v. Nassau R. Co.* 46 App. Div. 280; *McLunty v. Street R. Co.* 64 Ill. App. 549, 166 Ill. 203; *Bumbaer v. Market Street R. Co.* 139 Cal. 268, wherein it is said:

"Under these circumstances great care was imposed upon those charged with its operation to see that injury was not inflicted." *Siglin v. Armour & Co.* 103 Atl. 991.

The matter of the defendants' negligence should have been submitted to the jury. See 20 R. C. L. p. 188, ¶ 157; 5 R. C. L. p. 74, ¶ 713; *Galveston v. Gracha*, 100 S. W. 198; See also 29 L.R.A. p. 811, note heading, "Derailments," also L.R.A.1916C, 364.

G. M. Gannon and *H. W. Platt*, for respondents.

The liability of the operator of an automobile to a guest is not the same at all as the liability of a common carrier to a passenger. *Beard v. Klusameier*, 50 L.R.A.(N.S.) 1100; *Patnode v. Foote*, 138 N. Y. Supp. 221; *Massalette v. Fitzroy* (Mass.) Ann. Cas. 1918B, p. 1088.

It is not the act of permitting the injured party to ride the platform or footboard which is negligence, but it is necessary to show some act of neglect in the operation of the vehicle which resulted in the injury. *Patterson v. Transit Co. (Pa.)* 12 L.R.A.(N.S.) 839; *Cap. Traction Co. v. Brown (D. C.)* 12 L.R.A.(N.S.) 831 and note.

Negligence is a failure to exercise the degree of care demanded by the circumstances. N. D. Comp. Laws 1913, § 10358; *Zilke v. Johnson*, 22 N. D. 75, Ann. Cas. 1913E, 1005.

No presumption of negligence on the part of a driver of an automobile arises from the mere fact that he runs down and injures a pedestrian on a public street. *Mellsape v. Brogden* (Ark.) 32 L.R.A.(N.S.) 1177, and note.

The following cases are in point as to the application of the doctrine "*res ipsa loquitur*." *Bien v. Unger*, 64 N. J. L. 596; *Read Sterme v. Ontario Spinning Co.* 184 Pa. 519, 3 Am. Neg. Rep. 485; 12 S. D. 397, 81 N. W. 725; 117 Ga. 106, 43 S. E. 443; *Sestt v. London Dock Co.* 3 Hurlst. & C. 596; *Kletschka v. Minn. & St. L. R. R.* 8 Minn. 238, 8 Am. Neg. Rep. 68; *Croarke v. Maerulee*, 56 App. Div. 61, 11 Am. Neg. Rep. 49; *Duhme v. Hamberg Am. P. Co.* 184 N. Y. 404, 20 Am. Neg. Rep. 161; *May Belle Rhe v. Minn. St. R. Co.* 111 Minn. 271, 126 N. W. 823.

GRACE, J. This is an action of the plaintiff, by his guardian, to recover damages for personal injury alleged to have been caused by the defendants in the negligent operation of certain Ford automobile, being driven by her son, William Pudwill.

The complaint is in the ordinary and usual form in that class of actions. It sets forth the alleged carelessness and negligence of the defendants, and the facts, generally, upon which a cause of action is based.

The material facts are as follows: The plaintiff is a boy about fourteen years of age. Mary Pudwill was the owner of the car. She is

the mother of William Pudwill, who is about twenty-six years of age, and was driving the car on the day of the injury to the plaintiff.

The plaintiff and defendants lived on adjoining farms, and were well acquainted. Henry Grabau was temporarily staying in Wishek, North Dakota, where he was preparing himself for confirmation in the Lutheran Church. He had been staying in town about two years, attending school. He was attending the confirmation school of the Lutheran Church. Prior to that time he had lived upon the farm.

On the day he received his injury, it appears the Baptists were holding immersion services at a small lake, about 8 miles southeast of Wishek.

The plaintiff was standing on the street in Wishek, in front of his temporary residence, when the defendant and the three younger Pudwill girls drove up in a Ford car, and stopped. One of the girls went into the house.

While the car was thus stopped, the plaintiff stepped upon the running board and had some conversation with William Pudwill, who was driving the car.

The plaintiff asked where they were going, and was told, "To the lake." Within a short time, the defendants and the other children who were with them, proceeded on their way to the lake, the defendant, William Pudwill, driving the car. The plaintiff maintained his place on the running board.

Before leaving town, the defendant, William Pudwill, stopped the car and asked the plaintiff if he did not want to get down. The plaintiff replied that he wished to go to the lake, and the journey towards the lake was continued.

Between 6 and 7 miles from town, there is a curve in the road, and, at this point, the car left the road, ran some distance, perhaps 40 feet, and collided with a barbed wire fence. The plaintiff, who was still standing on the running board, was caught between the car and the fence, and his left leg was so severely injured as to necessitate its amputation, which was within a short time performed.

There is no evidence to show what caused the car to leave the track, nor to show that the car was broken or in bad condition.

There is no evidence of excessive or reckless speed. There is some evidence from which the inference might be drawn, that William Pud-

will was an inexperienced driver, the car in question having been purchased only about a month before the accident; and there is no evidence to show that he had ever had any experience in driving any car, except this one.

The defendants at no time asked the plaintiff to get into the car.

The answer of the defendants is a general denial, excepting as to certain admissions which appear in the answer. Defendants further, in substance, plead, that plaintiff, without the consent, and against the wishes, of defedants, jumped upon the automobile, and sought to ride with them on their journey.

The further plead that they twice ejected him from the automobile, but that the plaintiff again mounted the same, and attempted to ride with them. Defendants offer no proof of such ejectments.

The defendants show by their answer that the automobile became unmanageable, and that control of the same was lost, and that it collided with the wire fence, in which collision the plaintiff was injured. They plead contributory negligence of the plaintiff, and further allege due care and caution in themselves, in the operation of the automobile.

The defendants offered no evidence, but, at the close of plaintiff's case, made a motion for a directed verdict, on the ground that no negligence of the defendants had been proven, which motion was granted.

The granting of this motion, and the refusal of the court to submit the case to the jury, are the only errors assigned, and may be considered together.

The plaintiff submits four propositions upon which he relies. First, that the plaintiff was a guest of the defendants, by sufferance, at least, Second, that the defendants owed to him a duty that any common carrier owes to its guest. Third, that it was negligence upon the part of the defendants to allow the boy to ride upon the running board of the car, where he was exposed to danger. Fourth, that the fact that the car left the road a distance of 40 feet, and collided with a barbed wire fence, is evidence of negligence upon the part of the defendants, even though plaintiff is unable to state how the car came to leave the road.

The first of these propositions, we are inclined to think, needs little consideration. The plaintiff received no invitation to ride upon the car.

Yet, the defendants knew all the time, that he was upon the running

board of the car. He was in plain sight. He was a guest of the defendants, by sufferance. It is true, that he was a gratuitous guest, but this, alone, is not sufficient to relieve the defendants from, at least, the exercise of ordinary care for his safety. In fact, we can see but little difference between defendants' duty toward him as a gratuitous guest, after they acquired full knowledge of his presence on the running board, than if they had, in the first instance, invited him as their guest.

The defendants, however, contend, before there can be any liability on their part, it must appear that they were guilty of active negligence. We do not think that rule should be applicable to a case of this character.

If there is any evidence of negligence, such that the minds of reasonable men might draw from it different conclusions, it should have been submitted to the jury. We think there was such evidence.

It appears there is sufficient evidence to show that the defendants permitted the plaintiff to ride upon the running board of the car; at least, they acquiesced in his riding there; and especially is this true, after they had left town, and before the injury happened, on their journey to Green Lake. We think there is no dispute upon this point.

It is also clear the boy was very young. This was an additional reason, imposing the exercise of greater care on the defendants in the operation of the automobile than if he were one of more mature years. To permit a boy of such tender years to assume and maintain a position of danger on the whole journey, a large part of which was over country roads, is substantial evidence to show, *prima facie*, the negligence of the defendants.

In this case, we think, also, that the facts speak for themselves, and are evidence so substantial in character and degree, as to show, *prima facie*, negligence of the defendants.

The facts are undisputed that there was a curve in the road, and, shortly after passing it, the automobile jumped from the road, and ran approximately 40 feet to one side into a wire fence, and the injury occurred which has above been described.

It is true there is no evidence of the active or wilful negligence of the defendants; but the injury, nevertheless, occurred. It may not have been caused by fast or reckless driving, nor defect in the steering gear,

nor some obstruction or defect in the road; but, evidently, there was some cause for it.

In these circumstances, we think the principle of *res ipsa loquitur* is applicable. We think it is sufficient to make out a prima facie case of negligence against the defendants, to such an extent as to make the question of defendants' negligence one for the jury. *Cincinnati Traction Co. v. Holzenkamp*, 6 L.R.A.(N.S.) 800, and case note (74 Ohio St. 379, 78 N. E. 529, 113 Am. St. Rep. 980, 20 Am. Neg. Rep. 186).

It is the nature of the act, and the attendant circumstances and conditions, and not the nature of the relations between the parties, which gives rise to the presumption of negligence.

The doctrine of probabilities also, perhaps, has some application. It is probable that the defendant was driving at quite a high rate of speed, considering his inexperience as a driver; that he did not use proper care in the management of the car and lost control of it; that, if he had managed the car with due care, the injury would not have happened. And from these probabilities arises a presumption of the want of due care, or, in other words, the negligence of the defendants.

The defendants must be held to have known that which is common knowledge. Hence they must have known that country roads generally are not smooth; that they are often defectively constructed, or that there are ruts and holes in them, or culverts, too much elevated or depressed, imperfect and dangerous grades and curves; and they must have known, in traveling thereon in an automobile, even though the speed is not excessive, that it would be dangerous for one of tender years, as this boy, to stand upon the running board, while the car was being driven over such roads; for, under such conditions, there is always danger of the automobile jumping from the road, by reason of the ruts, holes, or defects above mentioned, and colliding with obstacles that may be near at hand, such as wire fences, telegraph or telephone poles, or any other obstruction; and, in such case, control of the car is lost.

It is plain that, if the defendants, at the inception of the journey, had stopped their car and compelled the boy to have gotten off the car and remained off, which they had a perfect right to do, or if they had taken the boy into the car, no injury to him would have occurred.

All the evidence and these conditions taken together, we think, would

prima facie show negligence on the part of the defendants to such an extent that whether they were negligent or not presented a question which should have been submitted to the jury for its determination.

We have examined, with care, the authority cited by respondent, including the classification of our statute, of the degrees of negligence, and the case of *Massaletti v. Fitzroy*, 228 Mass. 487, L.R.A.1918C, 264, 118 N. E. 168, Ann. Cas. 1918B, 1088, 18 N. C. C. A. 690, and find nothing therein which would cause us to reach a conclusion different to that at which we have arrived.

We think it was reversible error for the court to direct a verdict for the defendants, and to refuse to submit the question of their negligence to the jury. For these reasons, the judgment is reversed and the case remanded for further proceedings not inconsistent with this opinion.

The appellant is entitled to his costs and disbursements on appeal.

BRONSON, J. I concur in the result.

ROBINSON, J. I dissent.

CHRISTIANSON, Ch. J. (concurring specially). The trial court directed a verdict in favor of the defendant on the ground that plaintiff had failed to establish any actionable negligence on the part of the defendant. In view of the youth of the plaintiff, and all the attendant circumstances, I am of the opinion that the questions of negligence and contributory negligence were for the jury. Hence, I concur in the reversal; but I express no opinion as to whether the doctrine of *res ipsa loquitur* is applicable to the accident involved in this case.

BIRDZELL, J., concurs.

DAKOTA COFFEE COMPANY, a Corporation, Respondent, v.
MARTIN E. JOHNSON, Appellant.

(178 N. W. 291.)

Sales—evidence held to sustain verdict for price—whether there was a sale held a question for jury.

1. Plaintiff brought this action to recover for the agreed purchase price of

certain machinery, goods, wares, and merchandise, which it claimed to have sold defendant for the consideration mentioned in a certain bill of sale.

Defendant maintained that the price mentioned in the bill of sale was larger than he agreed to pay, and he also adduced testimony to support a defense not pleaded, *viz.*, that he had not purchased the property, but was merely financing the business.

Whether or not there was a sale, or whether defendant was merely financing the business, was a question of fact for the jury. Its verdict was in favor of plaintiff. It is *held*, there is substantial evidence to sustain the verdict.

Evidence — in corporation's action for merchandise sold, minutes of a meeting showing defendant's offer to buy merchandise were admissible.

2. It is *held*, in the circumstances of this case, the court did not err in admitting in evidence the minutes of a certain stockholders' meeting of the plaintiff corporation, it appearing that defendant was present at such meeting, and knew, or must be held to have known, what transpired at such meeting.

Opinion filed May 25, 1920.

Appeal from a judgment of the District Court of Cass County, Honorable *C. M. Cooley*, Judge.

Judgment affirmed.

T. A. Francis and *M. A. Hildreth*, for appellant.

Self-serving declarations are not admissible in the trial of a cause. That rule has always been applied to the records of a corporation. 3 Jones, Ev. Blue Book, 516a.

"Entries, of course, in the corporate books, are evidence against the directors and stockholders, but not in their favor." Abbott, Trial Ev. p. 52, ¶ 66, and cases cited in footnote; *Grayville v. New York C. & H. R. Co.* 34 Hun, 226; 3 Cook, Corp. 6th ed. p. 2380; *Jacobs v. Morgenthaler*, 112 N. W. 492; *Drake Coal Co. v. Groze*, 130 N. W. 357. In that case Stone, Judge, said: "A corporation cannot, as a party, introduce as evidence the unsworn declaration in its favor of one of its officers." 16 Cyc. 1206; *Johnson v. Spoonheim*, 123 N. W. 833; *Harrison-Remington Case*, 3 L.R.A.(N.S.) 956.

Pierce, Tenneson, & Cupler, for respondent.

Even the directors of a corporation are not ordinarily authorized to make sale of the entire business and property of the corporation. 7 R. C. L. pp. 641, 646; 3 Fletcher, Cyc. Corp. § 1998, p. 3175.

A party dealing with the agent of a corporation must, at his peril, as-

certain what authority the agent possesses. *Smith v. Courant Pub. Co.* 23 N. D. 297, 136 N. W. 781; *Des Moines Mfg. & Sup. Co. v. Tilford*, 9 S. D. 542, 70 N. W. 839; 7 R. C. L. pp. 625, 626.

"An agent cannot properly act for his principal when their interests are adverse." 7 R. C. L. p. 626; *Comp. Laws* 1913, § 4560.

"Statutory provisions requiring corporations to keep a record of their transactions or proceedings have been held to make such records the best evidence." 4 *Fletcher, Cyc. Corp.* § 2973m, p. 4048, note 46; cases cited in note to *Eureka Min. Co. v. Bullion Min. Co.* 125 Am. St. Rep. 843; 1 *Abb. Trial Ev.* 3d ed. § 54, pp. 149, 150.

The books of account of a corporation are admissible to prove a debt due the corporation when identified as provided by § 7909, *Comp. Laws* 1913. *Great West L. Ins. Co. v. Shumway*, 25 N. D. 268, 141 N. W. 479; *Haley & L. Co. v. Delvichic*, 36 S. D. 64, 153 N. W. 898, L.R.A. 1916B, 631, note.

Corporate records are admitted not as conclusive evidence of the fact, but to be submitted to the jury with all the other evidence pertinent to the issue. *Kitman v. C. B. & W. R. Co. (Minn.)* 129 N. W. 844; *St. Louis & S. F. R. Co. v. Sutton*, 169 Ala. 389, 55 So. 989, Ann. Cas. 1912B, 366; *Chesapeake & O. R. Co. v. Stojanski*, 191 Fed. 720; *Pridmore v. Chicago, R. I. & P. R. Co.* 192 Ill. App. 446, affirmed in 114 N. E. 176; *Big River Lead Co. v. St. Louis, I. M. & S. R. Co.* 123 Mo. App. 394, 101 S. W. 636; *Trowbridge v. Kansas City & W. B. R. Co.* 192 Mo. App. 52, 179 S. W. 777, also note in 125 Am. St. Rep. 856.

The verdict of the jury having substantial support in the evidence, the appellate court will not weigh the conflicting evidence, nor disturb the order of the trial court denying plaintiff's motion for a new trial. *Casey v. First Nat. Bank*, 20 N. D. 211, 126 N. W. 1011.

GRACE, J. This is an appeal from a judgment. The action was one by plaintiff to recover \$1,320.19, which it claimed was the agreed price of goods, wares, and merchandise sold by it to the defendant.

The defendant maintains that he made a verbal agreement with the plaintiff, through one Jacobson, the agent of plaintiff, whereby, for a consideration of \$3,000, he purchased from plaintiff the entire stock of goods, consisting of tea, coffee, spices, etc., and all of the machinery.

fixtures, and tools used in the business of the Dakota Coffee Company. He claims to have paid plaintiff the sum of \$3,000.

The plaintiff claims that the agreed purchase price of the machinery, fixtures, tools, etc., and the merchandise, was \$4,320.19, \$3,000 of which was for the machinery and tools, etc., and the remainder (amount for which suit is brought), the price of the merchandise.

The plaintiff executed and delivered to the defendant a bill of sale of the property above mentioned, and the consideration therein mentioned is \$4,321.71.

Whether the consideration for the property was the amount mentioned in the bill of sale, or the amount of \$3,000, as claimed by plaintiff, was a question of fact for the jury. In other words, whether a contract was made by defendant, to pay plaintiff for such property, the sum of \$4,320.19 or \$3,000, was a question of fact for the jury.

It decided that the contract was for the former amount. We think there is substantial evidence to support the verdict of the jury. The jury having thus decided, the question is not whether the verdict is sustained by a fair preponderance of the evidence, but whether there is any substantial evidence to sustain it.

The bill of sale having been properly and legally executed and delivered, and the consideration for the sale being therein stated, it is some evidence of a sale of the property for that amount.

One Jacobson was the secretary of the plaintiff corporation. He testified that the terms of sale agreed upon between him and Johnson was \$3,000, for the machinery, fixtures, etc., and for the stock of merchandise, invoice price, which amounted to \$1,321.71. The inventory of the merchandise was attached to the bill of sale.

It appears from the defendant's evidence, that, after the transaction, the business was moved to Moorhead, after which the defendant signed all the checks in payment of bills; that thereafter the letterheads of the Dakota Coffee Company had printed thereon the name of M. E. Johnson, Proprietor; that Jacobson was there employed on a salary at \$100 per month and expenses, which salary and expenses were paid by the defendant, and that arrangement continued until April 5, 1919, when the defendant gave a bill of sale to Jacobson's wife, of the machinery, fixtures, tools, scales, and other of the property involved in this action.

On April 7, 1919, Jacobson gave his note for \$1,000 to the First
45 N. D.—28.

State Bank of Moorhead, and the payment of the same was guaranteed by Anna P. Jacobson, his wife.

There is in evidence an unilateral agreement, signed only by the defendant, which bears date May 5, 1917, which purports to be made between the defendant and Jacobson, and which sets out that Johnson was to finance the purchase of the stock, furniture, machinery, and good will of the Dakota Coffee Company, and to advance certain money in carrying that business on, to the extent of the sum of \$5,000.

On the 5th day of May, 1917, Jacobson assigned to Johnson two certain insurance policies, aggregating \$3,000, subject to loans made on the policies, to the amount of \$582.

The minutes of the records of the plaintiff corporation show that a meeting was held at 2 o'clock, on the 3d day of May, 1917. At that meeting the manager, Jacobson, rendered a statement of the business; that statement including the cash on hand, money in bank, accounts receivable, merchandise then on hand, and the offer of the defendant on the machinery and fixtures showed assets aggregating \$12,380.46. The indebtedness was shown to be \$11,370.92.

Those records further show that the manager stated that he had an offer of \$3,000 for machinery, fixtures, etc., and \$1,321.71 for merchandise on hand, April 30th.

It is further shown that at this meeting the stockholders approved this offer, and authorized Jacobson to sell to Johnson upon the terms stated. Johnson was present at this meeting.

The unilateral agreement above mentioned, and the assignment of the insurance policies, are offered by the defendant, as evidence in support of his claim, that he had never purchased the property in question, but was only financing the business, and that the bill of sale, which he received for the property, was only taken as security.

As we view the matter, whether the defendant made an absolute purchase of the property in question, or whether he was merely financing the business, as he claims, was a question of fact for the jury. It found a verdict in plaintiff's favor for \$1,597.50. It thus must have found that the defendant purchased the property, and the verdict was for the value of the goods, as shown by the inventory.

It is conceded that the defendant had theretofore paid the plaintiff the sum of \$3,000.

The appellant strenuously contends that it was error for the court to permit to be introduced in evidence the minutes of the special meeting of the stockholders of the plaintiff corporation, which was held on May 3d, on the ground that, while the books of the corporation are evidence against it, they are rarely, if ever, evidence in favor of it; and that such evidence is of a self-serving character.

Perhaps the general rule is as plaintiff claims, and that, perhaps, the books and records of the corporation are not evidence against a stranger, or a stockholder claiming adversely to it; and that entries in corporate books are evidence against the directors and stockholders, but not in their favor.

The case of *Harrison v. Remington Paper Co.* 3 L.R.A.(N.S.) 954, 72 C. C. A. 405, 140 Fed. 385, 5 Ann. Cas. 314, supports defendant's contention. Other authority cited by the defendant is *Oregon & C. R. Co. v. Grubissich*, 124 C. C. A. 375, 206 Fed. 577; 3 Cook, Corp. 6th ed. p. 2380; *Jacobs v. Morgenthaler*, 149 Mich. 1, 112 N. W. 492.

We think, however, the facts in this case are such that the case does not come within the rule upheld by the authority cited by appellant, above mentioned. It is to be remembered that there is competent testimony of a tentative arrangement by and between Jacobson, agent of plaintiff, and the defendant, prior to May 3d, whereby the purchase price of the property in question was agreed to be \$3,000 for the machinery, etc., and \$1,320.71, price of the merchandise.

This offer or arrangement was reported by Jacobson at the special meeting of the stockholders, on May 3d, at which defendant was present; and thereafter, on May 5th, the bill of sale was executed by the plaintiff corporation to defendant, the consideration of which was exactly the amount agreed upon by the tentative arrangement referred to above, which, by the stockholders, was ratified in the presence of defendant, at the special meeting.

We think there is sufficient evidence to show that he did know and understand what occurred at the special meeting on May 3d.

In the circumstances we have mentioned, and existing in this case, we think it was not error to receive in evidence the minutes of the stockholders' meeting of May 3d, and that it was proper to submit them, together with all other evidence bearing upon the question of the sale of

the property, to the jury, so that it might determine, as a question of fact, whether or not a sale of the property, to the defendant, was made.

In this connection it may be well to note that, in his answer, the defendant alleges that he purchased, from Jacobson, all of the property in question, and that he agreed to pay the sum of \$3,000 therefor, and that he has wholly paid it.

At the trial, however, he seems to have repudiated the allegations of his answer, and did not introduce evidence in support thereof, but, on the contrary, introduced evidence of a defense not pleaded, to wit, that he did not buy the property, but was merely financing the business.

If it should be conceded that the rules relative to the amendment of pleadings could be so liberally construed, as to authorize the trial court to grant defendant's motion that his pleading be amended to correspond with the proof, and if that were done, we do not see how it would be of any material benefit to defendant, as it would still be a question of fact for the jury to decide, whether or not defendant purchased the property, or was financing the business, in the way to which he testified.

The verdict of the jury being in plaintiff's favor, it must have necessarily decided that defendant purchased the property in question, and at the price mentioned in the bill of sale.

The appellant has set forth forty-six assignments of error, largely relating to the reception or exclusion of certain evidence and certain offers of evidence, and the denial of certain motions made during the course of the trial.

Manifestly, we cannot discuss each of the assignments. It would make this opinion of undue length. Each of the errors assigned have been examined and considered, and none are found to be prejudicial and reversible.

The instructions given by the trial court are without reversible error. This is the second trial of this case to a jury. That the defendant has had a full and fair trial, there can be no doubt; and in this case his own testimony is sufficient and substantial evidence in support of the verdict; and, in view of his own testimony, it is difficult to perceive how another jury, in case a new trial were granted, could arrive at any other verdict than the jury did in this case.

The judgment appealed from is affirmed. Respondent is entitled to his costs and disbursements on appeal.

MARTIN SWIFT, Appellant, v. J. C. LEACH, J. A. Stiles, and W. R. Cibert, as the Board of County Commissioners of the County of Sioux and State of North Dakota, Respondents.

(178 N. W. 437.)

Indians — trust-patent Indians who have several tribal relations and become civilized may be qualified electors.

1. Trust-patent Indians holding allotted lands under the Federal Act of May 8th, 1906 (Burke Act) who have become civilized persons of Indian descent, and who have severed their tribal relations for two years next preceding an election, may be qualified electors at such election, under subdivision 2, § 121, North Dakota Constitution, as amended.

Elections — state may confer right of suffrage.

2. Although such trust-patent Indians are still dependent upon the Federal government concerning the rules and regulations enacted for their supervision, control and protection, under the national policy to assist the Indian towards emancipation, nevertheless, *where* it is shown that such trust-patent Indians have in fact become civilized persons of Indian descent and, in fact, for more than two years preceding a general election have actually severed their tribal relations and have adopted the modes and habits of civilized life, and, *where* it appears under the testimony of the Superintendents of the Indian Agency in charge of such Indians, both present and former, and others, that they were qualified as civilized persons, to be electors, and no objection or complaint on behalf of the Federal authorities was urged against their exercising such privilege, and, *where* it further appears that in the exercise of the state right of suffrage, under the Constitution of this state, there was and is no conflict or interference with the Federal policy of wardship towards such Indians, *it is held*, upon the record, that such trust-patent Indians were electors at the general election held on Nov. 5th, 1918.

Opinion filed May 26, 1920.

Election contest, upon the removal of a county seat, in Sioux County, Crawford, J.

From a judgment of dismissal, the plaintiff has appealed.

Affirmed.

Sullivan & Sullivan, for appellant.

The Indians are not a portion of the political community called the people of the United States; and, although not foreign nations or per-

sons, they always have been regarded and treated as distinct and independent political communities. *Worcester v. Georgia*, 5 Pet. 515; *Cherokee Nation v. Georgia*, 5 Pet. 1; *United States v. Osborne*, 2 Fed. 58; *Elk v. Wilkins*, 112 U. S. 94, 28 L. ed. 643, 5 Sup. Ct. Rep. 41, 45.

As to whether the evidence shows they have severed tribal relations or not. *Bem-Wam-Bin-Ness v. Eshelbey*, 87 Minn. 108, 91 N. W. 291.

The Indian cannot by his own act, without the consent of the government of the United States, sever his tribal relation, or release himself from the state of pupillage or the guardianship of the United States. *Elk v. Wilkins*, 28 L. ed. 647, 648.

In the absence of evidence that illegal votes cast at an election were given for any particular candidate, it is not error to apportion them among the several candidates and deduct pro rata from their respective scores. 15 Cyc. 372; *Ellis v. May*, 25 L.R.A. 331; *Gibbons v. Shepard*, 2 Brewst. (Pa.) 138; *Finley v. Walls*, 4 Cong. Elect. Cas. 367; *Platte v. Goode*, 4 Cong. Elect. Cas. 650.

Miller, Zuger, & Tillotson and *Edward S. Johnson*, for respondents.

The party holding the affirmative is required to prove the facts, and all the facts, necessary to make out a case. *Briggs v. Christ*, 28 S. D. 562, 134 N. W. 323.

To a state belongs exclusively the power to regulate suffrage and to determine who shall or who shall not be a voter. 10 Am. & Eng. Enc. Law, 2d ed. 570; *Anderson v. Baker*, 23 Md. 623; *Huber v. Riley*, 53 Pa. 112.

The 15th Amendment to the United States Constitution does not apply to Indians. 10 Am. & Eng. Enc. Law, 2d ed. 591; *Helgers v. Quinney* (Wis.) 8 N. W. 17.

In the relation of the government to the Indians, there is nothing affecting his right to vote in this state, or any other rights which he may possess under state laws. *Marchie Tiger v. Western Invest. Co.* 221 U. S. 286, 55 L. ed. 738; *Comp. Laws* 1913, § 4349.

The civil and political status of the Indians does not condition the government to protect their property or to instruct them. Their admission to citizenship does not deprive the United States of its power, nor relieve it of its duty, to control their property, to protect

rights. *United States v. Thurston County* (Neb.) 74 C. C. A. 425, 143 Fed. 289; *Richert v. Roberts County*, 188 U. S. 432, 47 L. ed. 532; *United States v. Osborne*, 6 Sawy. 406, 2 Fed. 58; *United States v. Rickert*, 188 U. S. 432, 27 L. ed. 532; *United States v. Celestine*, 215 U. S. 278, 54 L. ed. 195; *Hallowell v. United States*, 221 U. S. 317, 55 L. ed. 750; *United States v. Sandoval*, 231 U. S. 48, 58 L. ed. 107; *United States v. Nice*, 241 U. S. 591, 60 L. ed. 1192; *Williams v. Stenmetz* (Okla.) 82 Pac. 986; *Eells v. Ross*, 64 Fed. 417. See also *Frazee v. Spokane County* (Wash.) 69 Pac. 783.

BRONSON, J. *Statement*.—This is an election contest involving the removal of the county seat of Sioux county. Fort Yates has been the county seat since the organization of the county. At the general election held on November 5, 1918, there was submitted to the electors the proposition of removing the county seat of Selfridge, a town located some 18 miles west of Fort Yates, on the Milwaukee railway. As officially canvassed 479 votes (330 men, 149 women) were cast for Selfridge, and 393 votes (263 men, 130 women) for Fort Yates. At such election 273 so-termed trust patent Indians voted upon this proposition, in four of the eleven precincts in the county. The Standing Rock Indian reservation includes practically all of such county and extends also into Carson county, South Dakota.

At Fort Yates, the Indian reserve, comprising six or seven quarter sections of land, has been reserved for the Federal Indian agency and government school. Here, the superintendent of the Indian agency, for many years, has resided, and now resides. His jurisdiction now extends over the entire Indian reservation, excepting the homestead lands. This reservation has been open for settlement and allotment, under Federal authority, from time to time, the last proclamation of the President being in March, 1915, when allotments were closed.

Homesteaders have settled all through the reservation. Through land sales and *fee patent* sales, the white men have moved in here and there. The Indians who hold their allotted land, either under fee patent titles or so-termed trust patent titles from the Federal government, may be found farming side by side with white persons. There are no Indians on the reservation in this county, now living in communities and farming in common. The Indians do not live in Indian villages. As stated by the superintendent of the Indian agency, the Indians live

just the same as white people; their principal occupation is farming, and stock raising. They are scattered throughout the county, farming individually.

The trust-patent Indians, who voted at such election, are those who have received so-termed trust patents, as Indians of the Sioux tribe in this reservation, pursuant to the Federal Burke Act of May 8, 1906. 34 Stat. at L. 182, chap. 2348, Comp. Stat. § 3951, 3 Fed. Stat. Anno. 2d ed. 830. This act amended the Dawes Act of February 8, 1887. It provides for the allotment of land in severalty to an Indian and the issuance to him of a patent to be held in trust, for his use and benefit, for a period of twenty-five years, or such enlarged period as the President should direct. In part, it specifically provides:

"And every Indian born within the territorial limits of the United States to whom allotments shall have been made and who has received a patent in fee simple under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up within said limits his residence, separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property; *Provided*, That the Secretary of the Interior may, in his discretion, and he is hereby authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, encumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent: *Provided, further*, that until the issuance of fee-simple patents all allottees to whom trust patents shall hereafter be issued shall be subject to the exclusive jurisdiction of the United States."

The cause was tried before the court, without a jury, in June, 1919. At the trial the present superintendent of the Indian reservation, and two former superintendents, testified. Other witnesses were

with the conditions of life in Sioux county, the tribal relations, the civilization, and habits of life of the Indians, whose right to vote was questioned, likewise, testified.

From the testimony of the present superintendent, it appears that pursuant to the Federal policy of supervision, control, and protection over the Indian, this superintendent has general supervision over these Indians in Sioux county. He testified that every Federal regulation is made with the idea of giving to the Indian more individuality and to make him more independent. That the policy is to make the Indian absolutely self-supporting. That the idea of this supervision is to make it advisory rather than compulsory. He testifies that we are supposed to assist them in every possible way that we can, and encourage them to take up whatever vocation they wish.

There exists in this county an Indian court, established under Federal regulations, composed of two Indians and one white person. Trust-patent Indians are subject to its jurisdiction, involving minor offenses and the settlement of disputes. These Indians, however, may and do resort to the state or Federal courts. He testifies that "most of the cases are now being taken into the state and Federal courts;" that they are gradually doing away with the Indian court; that formerly it had one term a month, now it has only two terms during a year, and involves mostly cases of domestic trouble, which are generally settled by advice. The county is also divided into farming districts, over each of which there is a farmer, a sort of better farming agent, under his supervision. These farmers direct methods of better farming for both fee-patent and trust-patent Indians. Three of these farmers in charge of such districts are Indians. These farmers supervise farming, stock raising, sanitation, and policing. In a manner they have jurisdiction over white people, if they trespass. He testifies that there is no apparent distinction between trust-patent and fee-patent Indians in their method of living. Concerning this lack of apparent distinction he testifies that the competency court might come here to-day and grant fifty patents in fee, to those that would be otherwise trust-patent Indians for a good many years. That we have a couple of hundred more that will be turned loose next time the competency court comes here. That it requires simply the signature of the Secretary of the Interior to make them fee-patent Indians. Simply a transition from one to the other.

Concerning their lands, stock, and machinery furnished them by the Federal government, and concerning moneys or property due them from Indian land sales or through inheritance, regulations exist concerning receiving and disposition of the same by the Indians. These Indians, however, may sell wheat that he has raised; he may hire and discharge help; he may purchase implements and make his own contract therefor; he may sell his personal property if it is owned and purchased by him with his own earned money. Generally these Indians are not restrained in their free movements. He testifies concerning the advance in education of the Indians, that twenty years ago the schools were all strictly governmental institutions; then they had two government schools and nine day schools; now there is one government boarding school and four day schools. There are now eleven public schools. A large per cent of the Indian children are now attending the public schools. Of the Indians that are able to read and write, he testifies that between the ages of seven and forty years the percentage is 90. That there is an evident desire to become educated and to train their children like white men; that 90 per cent of the Indians belong to some church; that they take an active interest in governmental affairs; that they readily and promptly responded to our Federal government in supplying men through the draft and by volunteers, during the World War. That they subscribed liberally and freely to Liberty Bonds, War Saving Stamps, and other financial aids through the war; that they maintained their own Red Cross chapters; that they have contributed in Sioux county about 71 per cent of the funds for charity.

Another witness, Mr. Carignan, was superintendent of the Indian agency from 1903 to 1908. He has resided in Sioux county for thirty-eight years. He testified that for some twenty years the Indians have ceased to live in bands under a chief. That there is no difference between the life and character of fee-patent and trust-patent Indians. That their educational qualifications compare favorably with white people. That they marry the same as white people; they have fixed abodes; they live as white people. That they are competent to handle their own affairs, and their knowledge of English is as good as the average white man. That they have severed their tribal relations and adopted the mode of civilized life, and are well qualified to become citizens of this state.

Another witness, Mr. Belden, was also at one time a superintendent of the Indian agency. He has known these Indians in Sioux county continually since 1906. He testifies that they are living on their allotments, generally as white people live. That they have ceased to live in tribes; they do not owe obedience to chiefs; they have severed their tribal relations; that their progress, education, and ability to participate in governmental affairs compares favorably with the whites.

Another witness, Judge McG. Beede, now county judge in that county, formerly a clergyman, testified that he has had experience of twenty-three years with the Indians; he knows them intimately; he distinguishes fee-patent and trust-patent Indians by looking them up on the books; that these Indians live the same as white people. They are law abiding, do not live in tribes under chiefs; that they marry under the civil laws of the state the same as whites, and that they are Christians. That they have severed their tribal relations and adopted civilized life for a period dating back at least twenty years.

Mr. Stiles, the defendant county commissioner, testified, that he lived tributary to the territory involved for some thirty-one years. That he knew of no Indian living in the county in tribal relations; that the Indians lived in the same communities as the white people and among the white people, and their mode of life does not differ greatly to any extent from the white man. That they make good citizens.

Other witnesses also testified, but no evidence was introduced in contradiction of the testimony given concerning the civilization and the habits of these Indians.

The trial judge found that these trust-patent Indians were civilized persons, and had severed their tribal relations more than two years next preceding such election; that they lived separate and apart from each other and intermingled with the white people who have purchased and own land on the reservation, and with whom they are intermingled. That they live in separate houses, have a rather high standard of intelligence and education; that they maintain their churches and schools and in all walks of life, such Indians are on a par with the average communities of whites. He concludes that such trust-patent Indians were entitled to vote under the Constitution and laws of this state. Pursuant thereto, judgment of dismissal was entered

on March 23, 1920. The contestant immediately appealed. The record was filed in this court herein on May 6, 1920.

Issues.—The appellant states the issue on this appeal is:

“Whether or not such trust-patent Indians are entitled to vote under the constitutional provisions of this state.”

That this issue is made determinative upon the following propositions:

(1) That such trust-patent Indians were not citizens of the United States (Judge Crawford so found).

(2) That such trust-patent Indians are not civilized persons of Indian descent, who had severed their tribal relations two years next preceding the election contested.

(a) They are not civilized persons as contemplated by the Constitution.

(b) They have not severed their tribal relations.

(c) They cannot sever their tribal relations without the consent of the government of the United States.

(3) That such trust-patent Indians are under guardianship, and by reason of § 127 of article 2 Amendments to the Constitution of the state of North Dakota, cannot vote.

(4) That either such votes cast by such Indians should eliminate the total vote cast in Fort Yates, Porcupine, Cannon Ball, and Solen precincts or such votes should be apportioned between the two contestants and deducted pro rata from their respective scores.

(5) That by declaring such votes invalid, and by adopting either of the methods in four hereof to purge the election of such illegal votes, Selfridge carried the election by more than a two-thirds majority.

The respondent maintains that the record in this case clearly discloses that such trust-patent Indians are civilized persons of Indian descent, and have severed their tribal relations two years next preceding the election, and were constitutionally entitled to vote, at such election.

Opinion.—Able arguments and briefs have been presented by both parties. The fundamental questions involved affect and are of much importance to many residents of this state. The perplexing problem of the status of the Indian with relation to the state sovereignty is pre-

sented in connection with the Federal laws and policy of emancipation towards citizenship, now maintained by the Federal government, concerning his property rights and personal rights and privileges.

For the trust-patent Indians, upon the facts in this record, our legal concern is the application of the Constitution and laws of this state consistent with the maintenance of and noninterference with the Federal laws and the Federal policy, concerning their status.

Our Constitution (art. 2, Amendments) provides:

"Sec. 121. Every male person of the age of twenty-one years or upwards, belonging to either of the following classes, who shall have resided in the state one year, and in the county six months, and in the precinct ninety days next preceding any election, shall be a qualified elector at such election.

"First—Citizens of the United States.

"Second—Civilized person of Indian descent, who shall have severed their tribal relations two years next preceding such election."

The state, through its sovereign power, has the power to confer or extend the right of suffrage. 10 Am. & Eng. Enc. Law, 570; *Anderson v. Baker*, 23 Md. 531, 570; *Huber v. Reily*, 53 Pa. 112.

It is subject, however, in the exercise of his power, to the Federal constitutional provisions and the Federal laws enacted in pursuance thereof. 15 Cyc. 280.

There is no question presented nor contention made that the state does not possess territorial jurisdiction over the lands allotted to the trust-patent Indians and upon which they resided. See *State ex rel. Tompton v. Denoyer*, 6 N. D. 586, 599, 72 N. W. 1014; *State ex rel. Baker v. Mountrail County*, 28 N. D. 389, 393, 149 N. W. 120.

It is evident, therefore, that trust-patent Indians, under the Constitution of this state, are electors, if, upon this record, they are civilized persons of Indian descent who have severed their tribal relations two years next preceding the election, unless such extension of the right of suffrage to them conflicts or interferes with Federal constitutional or statutory provisions in the Federal policy of guardianship maintained towards such Indians.

Do the record facts disclose that the trust-patent Indians involved are civilized persons of Indian descent who have severed their tribal

relations two years next preceding the election held? We are satisfied that the findings of the trial court are correct in that regard, and are to be adopted as such by this court. There is no evidence whatsoever in the record, of the existence of any tribal relations concerning these trust-patent Indians for a period of years extending more than two years next preceding the election. Over these Indians there are no chiefs, either hereditary or appointed.

There is no showing that these Indians follow any tribal customs commonly pursued by Indians; they do not lead a nomadic or wandering life; they have homes and fixed abodes; they are engaged in the pursuit of agricultural industry; they live intermingled with the whites, having adopted and following their customs.

The evidence given by the superintendent, present and former, and persons who have been familiar with these Indians for many years, amply discloses that these Indians have wholly severed the modes and habits of Indian life and all tribal customs. The evidence sustains the findings that these Indians are civilized persons obedient to the laws of the state, following the customs of the white man in marriage and domestic life, in agricultural pursuit, in education, and religious life.

The appellant contends, however, that the dependent relation which exists between the Federal government and these Indians, as disclosed by the record, shows that they have such a status that they cannot be deemed civilized persons, and that this dependent relation negatives the right to recognize such Indians as civilized persons. This will be discussed further in connection with this Federal relationship. In the cases cited by the appellant (*Bem-way-bin-ness v. Eshleby*, 87 Minn. 108, 91 N. W. 291; *Opsahl v. Johnson*, 138 Minn. 42, 163 N. W. 988) it was held in each case upon the facts, that the Indians were tribal Indians and had not adopted the customs and habits of civilization.

Does the extension of the right of suffrage to trust-patent Indians who are found to be civilized persons who have severed their tribal relations conflict or interfere with the Federal policy towards such Indians, enacted through constitutional and statutory powers?

Repeatedly the Federal courts have stated that this policy is for the purpose of preparing the Indians for the habits of civilized life, and ultimately the privileges of citizenship. They have become wards

of the nation, recognized to be in a state of pupillage or dependent condition by reason of their former status, an alien nations, in a sense, owing allegiance to Indian tribes. *Elk v. Wilkins*, 112 U. S. 94, 28 L. ed. 643, 5 Sup. Ct. Rep. 41. This policy of the Federal government, in connection with the Dawes Act, in *Monson v. Simonson*, 231 U. S. 341, 58 L. ed. 260, 34 Sup. Ct. Rep. 71, is stated as follows:

"The Act of 1887 was adopted as part of the government's policy of dissolving the tribal relations of the Indians; distributing their lands in severalty and conducting the individual from a state of dependent wardship to one of full emancipation, with its attendant privileges and burdens."

That this condition continues until the Federal government deems it proper to withdraw its protective laws may not be doubted. *Elk v. Wilkins*, *supra*. That the state sovereign power does not extend so as to affect the Federal means for carrying into effect this national policy towards the Indian must likewise be granted. *United States v. Pearson*, 231 Fed. 270. Even after the Indian, subject to such wardship, becomes a citizen of the United States, and, by reason thereof, is entitled to vote, still the supervision, control, and protection of the Federal government in maintaining this national policy may still apply to him and restrain the exercise of state sovereignty in antagonism to this policy. *United States v. Nice*, 241 U. S. 591, 60 L. ed. 1192, 36 Sup. Ct. Rep. 696; *Marchie Tiger v. Western Invest. Co.* 221 U. S. 286, 55 L. ed. 738, 31 Sup. Ct. Rep. 578; *United States v. Celestine*, 215 U. S. 278, 54 L. ed. 195, 30 Sup. Ct. Rep. 93; *United States v. Rickert*, 188 U. S. 432, 47 L. ed. 532, 23 Sup. Ct. Rep. 478.

This policy of protection extending both to the property and the person of the Indian may exist and be continued, therefore, even though the Indian has become not only an elector, but also a citizen of the United States. The provisions of our Constitution relied upon by the appellant, which provide that no person who is under guardianship, *non compos mentis*, or insane shall be qualified to vote at any election (§ 127) has no application to this Federal status of the Indian. If it did have application, it would serve to disqualify the Indian from voting by reason of the status, whether he was a citizen of the United States, or a civilized person of Indian descent who has severed his tribal relation, under the constitutional provision (§ 121) hereinbefore

quoted. Upon this record, however, in extending the right of suffrage to these Indians, the state is simply acting consonant with the established policy of the Federal government to assist the Indian. It is not seeking in any manner to conflict or interfere with this Federal policy, but, in fact, to aid and assist it.

The appellant contends, however, that these Indians may not sever their tribal relation without the consent of the Federal government, and that the record does not disclose such consent in behalf of trust-patent Indians. Even though this principle be conceded, this record does disclose that this tribal relation has ceased for years. That the national policy towards these Indians has been to promote and foster this severance, and to bring these Indians to the ranks of citizenship as rapidly as possible. All of the Indian superintendents, present and past, three of them, who testified, affirm the nonexistence of tribal relations. Not a word in the record is stated by the Federal authorities, past or present, of any objection to this severance, in fact, of the tribal relations. No complaint is voiced by the Indian superintendent, now in charge, that the Federal government has not consented to this actual severance of such tribal relations. On the contrary his testimony is to the effect that the Federal government has promoted and fostered such severance.

It may be recognized as true that the conferring upon these Indians of the privileges of United States citizenship, and the release of this superintendence, control, and protection in connection with the policy of wardship towards the Indian, requires the consent of the Federal government, and to that extent the tribal relation or status is considered retained, when the Indian seeks to violate this status or state sovereignties attempt to infringe thereupon, but assuredly the national policy as directed towards the Indians concerned herein has been to dissolve, and its efforts devoted to sever such tribal relation in fact, and upon the status in fact, assuredly, the constitutional provision of this state should be applied.

In seeking to affirm this principle, the appellant has cited cases which may well illustrate the manner in which this matter of consent has been required. In *United States v. Osborn*, 2 Fed. 58, 61, an Indian not born a citizen could not become a citizen without the consent of the Federal government. In *Elk v. Wilkins*, *supra*, an Indian, at

Omaha, Nebraska, who had adopted the customs of the whites and abandoned the tribal relation, was neither a citizen of the United States nor a voter in Nebraska, because neither sovereignty had conferred upon him the privilege or its consent. In *United States v. Rickert*, 188 U. S. 433, 47 L. ed. 532, 23 Sup. Ct. Rep. 478; and *United States v. Pearson*, 231 Fed. 270, actions were maintained to restrain the collection of state taxes levied in South Dakota upon the property of Indians connected respectively with the Rosebud and Cheyenne Federal agencies, in contravention to the Federal policy concerning trust property given to the Indians. In these cases the continuance of this condition of wardship and dependence free from the interference by the state sovereignty is upheld. In *United States v. Nice*, *supra*, a prosecution was maintained for the sale of liquor to a trust-patent Indian, a member of the Sioux tribe in South Dakota. Even though the Indian was a citizen by virtue of a trust patent given under the original Daves act (and so a voter), it was held that the dependent condition of the Indian still continued subject to Federal control until Congress determined to dissolve the relation. It is further held, however, that citizenship is not incompatible with tribal relations, and may be conferred without completely emancipating the Indian and placing him beyond the reach of tribal governing.

These cases simply illustrate instances where an Indian has sought to exercise a right not conferred or extended, or where an attempt has been made to interfere with the Federal control, supervision, and protection pursuant to the national policy. The theory of the continuance of the tribal relation as asserted, or when stated as such, has been asserted or stated, not to show the necessity of the actual continuance of such relation, but the fact that the wardship of the Federal government is still continuing. This may continue under Federal authority to the Indians, who have become citizens, full fee-patent Indians, living apart and free from Indians or Indian tribes, and intermingled with the whites. *Marchie Tiger v. Western Invest. Co.* 221 U. S. 296, 55 L. ed. 738, 31 Sup. Ct. Rep. 578; *Cherokee Nation v. Hitchcock*, 187 U. S. 294, 47 L. ed. 183, 23 Sup. Ct. Rep. 115.

The fact that in the Burke act it is provided that until the issuance of fee-simple patents to allottees, they shall be subject to the exclusive jurisdiction of the United States, is not construed to mean that the laws

of this state which they are now enjoying and using do not extend to them, and that this state may not confer the right of suffrage when not in interference with the Federal laws and policy. See *State ex rel. Tempton v. Denoyer*, 6 N. D. 586, 599, 72 N. W. 1014; *State ex rel. Baker v. Mountrail County*, 28 N. D. 389, 393, 149 N. W. 120.

Upon this record, the facts show that these trust-patent Indians have long since severed, in fact, their tribal relations. The Federal policy as shown and disclosed has urged, directed, and promoted this actual severance of tribal relations. The Federal authorities, so far as they have appeared in this action, the superintendents of the agency in question, having the supervision and control of these Indians for many years, testify to the facts and affirm the conclusion that the tribal relations concerning these Indians have in fact long ceased. This sufficiently established the nonexistence of the tribal relations concerning such Indians under the constitutional provision of this state. The Federal authorities of the present and past, acquainted with these Indians and the conditions, not denying, not objecting, but affirming that these Indians are civilized persons who have severed their tribal relations, state, and, through their testimony, seek to have these Indians enjoy the privileges of electors in this state, all to aid and assist these Indians, consonant with the Federal policy of emancipation, in attaining a higher degree of civilization and interest in governmental affairs of our country.

In thus extending to such Indians the recognition of the right of suffrage, in North Dakota, pursuant to our Constitution, this record discloses no interference with this Federal policy of wardship. Upon this record, it may well be held that North Dakota, through its constitutional authority and laws, extends to such trust-patent Indians, peopling and tilling our soil, obeying our laws, and having adopted and observed the habits and mode of life of civilized persons, the right and the welcome to participate as electors in its government, so long as this privilege does not conflict nor interfere with the Federal policy of wardship and protection. The trial court's finding that such trust-patent Indians are electors under subdivision two of the constitutional amendment quoted, upon the facts in this record, is upheld. The determination of this question, being decisive of this appeal, renders it unnecessary to consider the other questions presented.

Judgment is affirmed, with costs.

STUTSMAN COUNTY, a Public Corporation, Plaintiff, v. DAKOTA TRUST COMPANY, a Corporation, Defendant.

(178 N. W. 725.)

Appeal and error — trial court must determine that question of law that is doubtful and determinative of issue before certifying it.

1. In certifying a question of law to the supreme court, pursuant to chapter two, Session Laws 1919, the trial court must first exercise its sound judicial discretion in determining that the question of law involved is doubtful, vital, and principally determinative of the issues in the case to the end that causes may not be delayed in final hearing and determination, and that a certified question of law may not be made, when reviewed and determined by the supreme court applicable and determinative upon issues and facts not clearly determined or settled.

Appeal and error — on certified questions, supreme court exercises only its appellate jurisdiction.

2. Under such statute, the supreme court exercises alone its appellate jurisdiction. It may review a certified question of law determined or adjudicated by the trial court. It can neither give an advisory opinion nor try and determine questions of law or of fact as original questions.

Appeal and error — certified question must be a formulated question of law.

3. In certifying a question of law, pursuant to such statute, it is necessary that the trial court determine, settle, adjudicate, and certify to a formulated question of law. This question of law must be clearly stated and not involve questions of fact, or those of mixed law and fact. It must be distinctly stated so that it can be determined by the supreme court without regard to other issues of law or of fact.

Opinion filed May 29, 1920.

Certified question of law, from District Court, Stutsman County,
Coffey, J.

Proceeding dismissed.

John W. Carr, for plaintiff.

A surety is an insurer of the debt. Northern State Bank v. Bellamy,
19 N. D. 509, 125 N. W. 888.

A paid surety or bonding company is treated rather as an insurer than a surety. Long v. American Surety Co. 23 N. D. 492, 137 N. W. 41; 20 Cyc. 1400.

If a debt ought to be paid at a particular time, and is not then paid, legal interest upon it shall be paid during such time, as the party is in default. *Empire State Surety Co. v. Lindenmeier*, Ann. Cas. 1914C, 1192.

Lawrence & Murphy, for the defendant.

"A surety cannot be held beyond the express terms of his contract, and if such contract prescribes a penalty for its breach, he cannot in any case be liable for more than the penalty." *Comp. Laws* 1913, § 6677.

"In interpreting the terms of a contract of suretyship the same rules are to be observed as in the case of other contracts." *Hubbard v. Callahan*, 42 Conn. 534, 19 Am. Rep. 575; *Hopkins v. Crittenden*, 10 Tex. 189; *Findley v. Hall*, 12 Ohio, 610; *Spencer v. Maxfield*, 16 Wis. 178; *Adams v. Way*, 33 Conn. 431; *Cornwall v. Sac County*, 96 U. S. 61; *Enbyre v. McDaniel*, 28 Ill. 203; *Hand v. Armstrong*, 18 Iowa, 327; *McLean v. Abrams*, 2 Nev. 207; *Casey v. Gibbons*, 136 Cal. 371; *Kendall v. Porter*, 120 Cal. 109; *Guy v. Franklin*, 5 Cal. 417; *Kohler v. Smith*, 2 Cal. 597; See also notes in 6 Am. Dec. 190; 61 Am. Dec. 64; 72 Am. Dec. 116, and 90 Am. Dec. 48.

BRONSON, J. This is a proceeding involving the certification of questions of law pursuant to chapter 2 of the Sess. Laws 1919. In the district court action was instituted to recover upon a surety bond given by the defendant to the plaintiff, covering the demand deposits of the plaintiff, in the Medina State Bank, for which bank a receiver had been appointed. Without any trial or adjudication, the parties have stipulated the facts and the questions of law involved upon such facts. The trial judge has made a certificate, certifying the cause to this court upon the questions of law involved and as appearing from the stipulation made between the parties. The record is composed of the complaint, the answer, and the stipulation of the facts and law questions involved. The question of law primarily presented from the stipulation of the parties is whether the plaintiff is entitled to recover from the defendant, the surety, interest at the legal rate of 7 per cent per annum from the date of its demand, January 30, 1914, or interest at the rate of 8 per cent per annum in accordance with the con-

tract rate stipulated by the bank in its proposal for the demand deposits of the county.

The manner and form in which this proceeding has been certified requires a construction of chapter 2, Sess. Laws 1919, and the procedure to be followed thereunder. In *Guilford School Dist. v. Dakota Trust Co.* 46 N. D. —, 178 N. W. 727, a similar contemporaneous case before this court, Chief Justice Christianson, writing the opinion of the court, has set forth at length the statute involved, has discussed the appellate jurisdiction of this court and the necessity of the trial court ruling upon the questions of law certified. It becomes unnecessary to restate what has been stated in that opinion in that regard.

The statute involved is a procedural statute, in the exercise of the appellate jurisdiction alone of this court. It is a statute of review. It does not contemplate the making of mere advisory opinions to the trial court, nor the exercise of the original jurisdiction of this court.

The purpose of this statute is to expedite the trial and determination of causes, when it becomes apparent during the course of a proceeding in a trial court that a question of law, doubtful and principally determinative of the issues and facts proved, or essential to be proved, is presented. In such event an opportunity is afforded, through this statute, to secure a review of the determinative question of law, without invoking the more lengthy process of statutory appeal. A certified question of law, however, so presented to this court, must involve the exercise of its appellate, not its original, jurisdiction.

In this regard a somewhat similar procedure, in the Federal courts, under Federal acts, may be considered. For many years provision was made for the certification of a question of law from the circuit court to the Supreme Court of the United States. The act provided, among other things, as follows:

"When a final judgment or decree is entered in any civil suit or proceeding before any circuit court held by a circuit justice and a circuit judge or a district judge, or by a circuit judge and a district judge, in the trial or hearing whereof any question has occurred upon which the opinions of the judges were opposed, the point upon which they so disagreed shall, during the same term, be stated under the direction of the judges, and certified, and such certificate shall be entered of record."

Rev. Stat. § 652; Act of June 1, 1872, chap. 255, 17 Stat. at L. 196; Act of April 29, 1802, chap. 31, 2 Stat. at L. 159.

This act was considered repealed by the Act of March 3, 1891. See *United States v. Rider*, 163 U. S. 132, 41 L. ed. 101, 16 Sup. Ct. Rep. 983.

"By the Judiciary Act of March 3, 1891 (26 Stat. at L. 826, chap. 517), a review by certificate is limited to the certificate or its equivalent by the circuit courts, made after final judgment, of the question, when raised, of their jurisdiction as courts of the United States, and to the certificate by the circuit courts of appeal of questions of law in relation to which the advice of this court is sought as therein provided, which certificates are governed by the same rules as were formerly applied to certificates of division." *Baltimore & O. R. Co. v. Interstate Commerce Commission*, 215 U. S. 217, 54 L. ed. 167, 30 Sup. Ct. Rep. 86.

Concerning this procedure, the court, in the above cited case, stated:

"And it has been established by repeated decisions that questions certified to this court upon a division of opinion must be distinct points of law, clearly stated, so that they can be distinctly answered without regard to other issues of law or of fact and not questions of fact or of mixed law and fact; involving inferences of fact from particular facts stated in the certificates; nor yet the whole case, even if divided into several points. *Jewell v. Knight*, 123 U. S. 426, 433, 31 L. ed. 190, 192, 8 Sup. Ct. Rep. 193.

"And finally, it has been settled that the whole case, even when its decision turns upon matter of law only, cannot be sent here by certificate of division.

"In *White v. Turk*, 12 Pet. 238, 9 L. ed. 1069, it was said: 'That certificate of the judges, in this case, leaves no doubt that the whole cause was submitted to the circuit court by the motion to set aside the judgment on the bond. And, had the court agreed in opinion, and rendered a judgment upon the points submitted, it would have been conclusive of the whole matter in controversy between the parties. This certificate, therefore, brings the whole cause before this court; and, if we were to decide the questions presented, it would, in effect, be the exercise of original, rather than appellate, jurisdiction.' This practice was declared irregular by Chief Justice Taney in *Webster v. ...*

10 How. 54, 13 L. ed. 325; and the chief justice added that it 'would, if sanctioned, convert this court into one of original jurisdiction in questions of law, instead of being, as the Constitution intended it to be, an appellate court to revise the decisions of inferior tribunals.' So Mr. Justice Miller, in *United States v. Perrin*, 131 U. S. 55, 58, 33 L. ed. 88, 89, 9 Sup. Ct. Rep. 682, said: 'But it never was designed that, because a case is a troublesome one, or is a new one, and because the judges trying the case may not be perfectly satisfied as regards all the points raised in the course of the trial, the whole matter shall be referred to this court for its decision in advance of a regular trial, or that in any event the whole case shall be thus brought before this court.' Such a system converts the Supreme Court into a *nisi prius* trial court; whereas, even in cases which come here for review in the ordinary course of judicial proceeding, we are always and only an appellate court, except in the limited class of cases where the court has original jurisdiction."

It is apparent that, in the consideration of certified questions from the circuit court of appeals, the Supreme Court is simply considering, in the exercise of its appellate jurisdiction, a question that has already been presented upon appeal to the circuit court of appeals, whose jurisdiction is exclusively appellate. See *United States v. Mayer*, 235 U. S. 55, 59 L. ed. 129, 35 Sup. Ct. Rep. 16; 5 Fed. Stat. Anno. 2d ed. p. 838. In order, therefore, that this court may exercise its appellate jurisdiction in the consideration of a certified question of law, it is essential that the trial court must first exercise its sound discretion in determining that the question of law to be certified is doubtful, vital, and principally determinative of the issues in the case. This is essential in order that cases may not be delayed, and that the question of law certified (to become the law of the case when determined) be not made determinative upon issues or facts not clearly settled or ascertained. It is further necessary that the trial court determine, settle, adjudicate, and certify to the formulated question of law. The question of law must be clearly stated, and not involve questions of fact or those of mixed law and fact, involving inferences of fact from particular facts stated in the certificate. It must be so distinctly stated that it can be answered and determined by this court without regard to other issues of law or of fact. Otherwise this court may be required to pass upon

and determine the issues of law or of fact presented as original questions. In the case at bar this procedure has not been followed. It cannot, therefore, assume jurisdiction. Proceedings are dismissed without costs to either party.

CHRISTIANSON, Ch. J., and ROBINSON and BIRDZELL, JJ., concur.

GRACE, J. I concur in the result.

JOHN B. ANDERSON, Appellant, v. WESTCHESTER FIRE INSURANCE COMPANY, a Corporation, Respondent.

CHARLES P. STROM, Appellant, v. WESTCHESTER FIRE INSURANCE COMPANY, a Corporation, Respondent.

(178 N. W. 434.)

Insurance — hail insurance held not to take effect within twenty-four hours under statute where agent had no notice of amount or crops or land to be covered.

1. Where applications for hail insurance are signed by the applicants upon a farm, and then sent by mail to the local agent, without the notice or knowledge of the local agent as to the amount of the insurance, the specific crops or lands to be covered, § 4902, Comp. Laws 1913, which provides that hail insurance shall take effect from and after twenty-four hours from the day and hour the application for such insurance has been taken by the authorized local agent of the insurance company, does not apply.

Insurance — minds of parties who contracted for hail insurance held not to have met so as to create liability for losses.

2. Where the local agent of a hail insurance company furnishes application blanks to one who has been assisting him in writing insurance, and instructs such party that he may sign the application blank on his farm and send it to him by mail, and that such may be one under the instructions of the hail insurance company, which provides for insurance becoming effective twenty-four hours from the day and hour of the actual signing of the application; and

Where, pursuant thereto, such party signs an application blank and causes another, his brother-in-law, so to do, upon his farm, on July 19, 1918, at 8 P. M., and thereupon deposits the same in a rural mail box on July 20, 1918,

without the notice or knowledge of the local agent as to the amount of the insurance, specific crops or lands to be insured or the specific company to which such application is made; and

Where such application blanks so signed, in the course of the mail, are not received by the agent until July 22, 1918, during which time hail losses have been sustained upon the crops covered in the application, concerning which losses the local agent is advised, before he actually signs such application,—

It is *held*, that under the instructions of the defendant, the provisions in the application blanks, and the directions given by the local agent, the minds of the parties never met upon the terms or conditions of any contract of insurance existing at the time when the hail losses were sustained.

Opinion filed June 3, 1920.

Two actions in District Court, Burleigh County, *Nuessle, J.*, to recover upon hail insurance contracts, tried and considered together.

From a judgment of dismissal the plaintiffs separately appeal.

Affirmed.

F. E. McCurdy, for appellant.

As to the question whether or not the company has signed it or given consent, see *Nowark Machine Co. v. Kenton Ins. Co. (Ohio)* 22 L.R.A. 768.

As to the question of acceptance by mail, see *Northwest Mut. L. Ins. Co. v. Joseph*, 31 Ky. L. Rep. 714, 12 L.R.A.(N.S.) 439, 103 S. W. 317.

The authority of an agent to do certain acts on behalf of his principal may be inferred from his doing them for such a time that the principal would naturally have known of it, and have forbidden them if unauthorized. *Dierkes v. Haux Hurst Land Co. (N. J.)* 79 Atl. 361, 34 L.R.A.(N.S.) 693, note.

While an offer must be definite, and there must be a meeting of the minds, yet that offer may be made in any manner which would communicate, even though it be but a mere advertisement in a newspaper, and it need not be definite as to quantity. 6 R. C. L. 23, p. 600.

The method of communication may be any method agreed upon between the parties or by any usual method of communication. *Howard v. Daly*, 19 Am. Rep. 285; 6 R. C. L. 606.

Lawrence & Murphy, for respondent.

"To constitute a binding contract of insurance there must be a meet-

ing of the minds of the parties with authority to contract as to the premises and risk, the matter insured, the term of insurance, and the amount of the premium." *Shawnee Mut. F. Ins. Co. v. McClure*, 135 Pac. 1150; *People's Ins. Co. v. Badden*, 8 Ill. App. 447.

An application for insurance is a mere proposal, which the company can accept, reject, or modify, and until the minds of the parties meet by agreement upon all the terms and until all the conditions required are performed, no contract arises. *McCully v. Phoenix L. Ins. Co.* 18 W. Va. 782; *Lowe v. St. Paul F. & M. Ins. Co.* 114 N. W. 586; *Shawnee Mut. F. Ins. Co. v. McClure*, 135 Pac. 1150.

A contract is an agreement to do or not to do a certain thing. It is essential to the existence of a contract that there should be parties capable of contracting, and that they did actually contract. In this case the proof shows only a mere application for an insurance contract. The judgment of the district court is affirmed. *Wacker v. Globe F. Ins. Co.* 37 N. D. 13, 163 N. W. 263.

BRONSON, J. *Statement*.—These are two actions to recover losses to crops through hail, upon special insurance contracts. The cases were tried before the trial court without a jury; the evidence in both cases was submitted to the court together, and the cases have been argued and briefed as companion cases upon appeal. The trial court rendered judgment dismissing the actions with prejudice. The plaintiffs have severally appealed from the judgment of dismissal. The facts and principals of law applicable being similar, the two cases, as the parties agree, may be considered together.

The facts substantially are as follows:—

The plaintiffs are farmers residing in Burleigh county. The defendant is engaged in the hail insurance business, with the general agents at Minneapolis. In July, 1918, Mr. Vold was the local agent of the defendant, at Regan, North Dakota, and the cashier of the Farmers State Bank of Regan.

On the evening of July 19, 1918, at the home of the plaintiff Anderson, the plaintiffs each made and signed an application for hail insurance upon the crops of grain growing upon their respective half sections of land. In an envelop furnished by the agent Vold, Anderson inclosed these two applications, together with individual notes of the

plaintiffs, payable to the Farmers State Bank, for the premiums, without any letter. He addressed the envelop to the agent Vold at Regan, North Dakota. The next morning, July 20th, he deposited this envelop in the rural mail box near his home. Through the rural mail carrier service this mail arrived at Baldwin, a town near Regan, during the afternoon or evening of July 20th. The envelop bears the postmark Baldwin, July 22d. This envelop was received by the agent Vold at Regan, North Dakota, on the morning of July 22d, through the train service from Baldwin to Regan. On July 21st, between 4 and 5 p. m., the crops covered by these applications were destroyed or damaged by hail. On the morning of July 22d at or about the time the train arrived carrying this mail from Baldwin, the plaintiffs drove to and arrived at Regan to see the agent about these hail losses.

The plaintiffs notified the agent Vold concerning their hail losses, shortly before the agent had received this mail from the post-office. During the day of July 22d, and after he was notified of the hail losses, he signed the applications as agent, stating thereon that such applications were taken on the 19th day of July, 1918, at 8 p. m. On this day, these applications, together with a certificate of deposit of the Farmers State Bank, in payment of the premium, were mailed to the general agents of the defendant in Minneapolis. Likewise, in a separate envelop there were mailed, by each of the plaintiffs, notices of the hail losses sustained.

On July 25, 1918, the general agents, in response, wrote their agent to the effect that the applications did not reach them within a reasonable time after July 19, 1918, that their instructions were not observed; that they were unable to protect themselves by reinsuring; that they rejected the applications and returned the certificates of deposit. In reply to this letter, on July 27th, the agent wrote a letter, wherein he explained the manner in which such applications were signed and mailed to him, and their subsequent mailing by the agent on July 22d. He further advised the general agents that if the policies were not sent and adjustment made within a reasonable time he would turn the matter over to their attorney for adjustment according to law.

This action, subsequently, in September, 1918, was instituted. Trial was had in December, 1918, and the judgments rendered on September

18, 1919. The records upon these appeals were filed in this court upon April 23, 1920.

The plaintiff Anderson testified that Vold was the agent for several insurance companies. That he had been associated with him somewhat, assisting in procuring customers for insurance. He had taken out previously some hail insurance in June, 1918, covering the same property for the same amount with the Middlewest Fire Underwriters Agency, through Vold as agent. Previous to July 19th, the plaintiff Anderson had seen Vold, and had a talk with him about some more hail insurance in this defendant company. Vold suggested that he ought to take a little more insurance. He gave him some application blanks to take with him, including some application blanks in other companies. Anderson made arrangements with the bank to take care of the premium if he should take out additional hail insurance. He had these applications to use if anyone should call for them. He testified that this application was made on his own voluntary motion. That no agent of the company was there when he signed it; that before that time he had not made up his mind as to whether he would take out insurance with the defendant company. That he figured up his application alone.

The agent Vold testified that he had a talk with the plaintiff at the time when he took out a policy in the Middlewest Fire Insurance Company. (The date of the application in such Middlewest application is June 7, 1918.) That he told Anderson, "that that vicinity nearly always had hail, and that he better take double insurance. That is what all his neighbors were doing." That Anderson told him that he would wait a while, and the agent, "I will send a few applications out with you." He testified that he gave Anderson several blank applications. That Anderson asked him if it would be all right to sign up the applications and send them in. That he, the agent, looked up the instructions of the defendant, read them to the plaintiff Anderson, and told him that it was all right. That he advised Anderson that he could have the application filled out and sign it up, and if he came to town to bring it along, and, if not, to send it through the mail, and he gave him a big envelop for such purpose. The agent did not have any talk with the plaintiff Strom about hail insurance.

In the evidence was introduced plaintiff's exhibit H, which contains instructions stating that it is very important that agents mail the

cations, both the original and duplicate, to the offices of the general agents the same day that they are signed, as the liability of the company becomes effective twenty-four hours from the hour and date of the actual signing of the hail applications. Another notice also is contained therein, that applications must be made in duplicate, and that the agents must sign the application in writing. The agent Vold further testified that when he gave the blank applications to the plaintiff Anderson, it was then undetermined as to whether the plaintiff would take out any more insurance. That the first knowledge he had concerning the application was when he opened the mail on July 22d, and that this was the first communication of any kind that an application for insurance had been signed by either of the plaintiffs. It further appears in the evidence that the plaintiff Anderson had telephonic communication with Regan, and that he did not call up or otherwise inform the agent Vold about these applications having been signed at any time until he came to Regan, after the hail losses had occurred. The trial court, in its findings, determined that no contract was ever made between the parties, and that the loss occurred prior to the signing of the applications.

Contentions.—It is the plaintiff's contention that the insurance claimed is not for a loss occurring under any policy of insurance, but under a clause in the application stating that the company assumes a liability for a loss and damage by hail only to the crops involved, beginning twenty-four hours from the hour and day of the actual signing of the applications by the plaintiff, and continuing for seventy-two hours thereafter; in other words, that, for advertising purposes, this defendant agreed to give the parties insurance for a period of forty-eight hours; that defendant advertised that that is insured which is not covered by any policy, and in case the application is rejected that insurance is given free. In support of this contention it is urged that the defendant's local agent, Vold, whether within or contrary to his instructions, made an offer directly to Anderson, and more or less indirectly through Anderson to Strom, to permit that such liability be assumed by the plaintiffs signing such applications and mailing the same to the agent; that such agent at least had ostensible, if not actual, authority so to do; that the plaintiffs accepted such offer and complied with its terms.

The defendant contends that, irrespective of whether the agent had actual or ostensible authority, the facts disclose no offer upon which an acceptance could be based to constitute a special contract of insurance, and that, under the statute, no contract of insurance existed.

Opinion.—The facts have been stated somewhat at length. They are practically not in dispute. They are substantially embodied in the findings of fact made by the trial court. Upon these findings (separately made in each case), it concluded, in substance, that the minds of the parties never met upon the terms and conditions of any contract of insurance, and that no contract for insurance was in force at the time when the losses were sustained. We are satisfied that these conclusions of the trial court are correct, and that the defendant is not liable to either of the plaintiffs.

Section 4902, Comp. Laws 1913, provides that every insurance company engaged in the business of insuring against loss by hail in this state shall be bound, and the insurance shall take effect from and after twenty-four hours from the day and hour the application for such insurance has been taken by the authorized local agent of said company. Upon the facts in this record, it is clear that, under this statute, no insurance contract was effective, either with Anderson or Strom, twenty-four hours after each application was signed by them upon the farm. Then, the agent Vold had not taken the applications. He then had neither notice nor knowledge of the amount of the insurance, the specific crops or lands to be covered, in the respective applications.

But the plaintiffs contend, as stated, that the agent, possessing general authority, represented and offered to Anderson, and advertised, that in accordance with the instructions of the defendant, insurance would become effective twenty-four hours after actual signing of the applications by the plaintiffs, and that the defendant cannot be heard to complain if the agent did deviate from his strict instructions by reason of the apparent ostensible authority of such agent. That, therefore, special contracts of insurance existed after the lapse of the twenty-four hour period from the actual signing of such applications, upon compliance by the plaintiffs with the terms of the representation and offer. This contention cannot be upheld.

Clearly in the instructions of the defendant, which were read to the plaintiff Anderson, and in the application blanks which were signed by

the plaintiffs, it is contemplated and provided that the applications must be taken and signed by the local agent before the twenty-four hour period begins.

The claimed representation and offer of the agent Vold fails to show any agreement or even definite offer for the writing of any specific insurance in the defendant company, upon the property of either Anderson or Strom. Under the most favorable interpretation, the agent Vold simply arranged for the plaintiff Anderson to send in applications for hail insurance by mail. He furnished to him application blanks and an envelop, and these apparently were furnished some six weeks before the applications were actually signed. True, he suggested to Anderson that he should take double insurance. But Anderson might make an application, under this arrangement, for such amount, upon such crops, and in what company he saw fit; for he had application blanks of other companies. He might take and make the application for another, likewise, as he did. The fact that he mistakenly believed, under the arrangement as suggested by the local agent, that he could make the contract effective, alone for himself and for others, at such time and for such amount of insurance as he saw fit, without the notice, knowledge, or action of the local agent, falls far short of completing the essential elements necessary for a contract. 1 Elliott, Contr. § 26, 27, 36. Neither the instructions of the defendant, the provisions of the application blank, nor the so-termed arrangement of the local agent, may be construed to mean that the applicant might initiate insurance, or that this might be made a means of securing hail insurance gratis, without the notice, knowledge, or consent of the agent. The judgments are each affirmed, with costs.

CHRISTIANSON, Ch. J., ROBINSON, BIRDZELL, JJ., concur.

GRACE, J. (concurring in part and dissenting in part): In my opinion Anderson had a contract of insurance. It is also my opinion Strom did not have a contract of insurance. The judgment of dismissal should be affirmed in the Strom case, and, in the Anderson case, the judgment of dismissal should be reversed and a new trial granted.

FRED E. LILLY, Respondent, v. ELM POINT MINING COMPANY, a Corporation, Appellant.

(178 N. W. 128.)

Damages — four thousand dollars for serious and painful injury and fracture of a lower rib held not excessive.

1. This is a personal-injury suit, in which the plaintiff recovered a verdict for \$4,000. It is not excessive.

Master and servant — injury from order to work in dangerous place actionable.

2. By direction of defendant, the plaintiff tried to work in a dangerous place on a trestle, where he had to stand on a narrow rail. He lost his balance, fell, fractured a rib, and was severely injured.

Opinion filed May 1, 1920. Rehearing denied June 4, 1920.

Appeal from the District Court of McLean County, Honorable *J. A. Coffey*, Judge.

Affirmed.

Hanchett & Johnson, for appellant.

Prior and remote cause cannot be made the basis of an action if such remote cause did nothing more than furnish the condition or give rise to the occasion by which the injury was made possible. *Cavanaugh v. Centerville Block Coal Co. (Iowa)* 109 N. W. 303.

A servant may sustain a dual relation towards the other servants in that he is vice principal as to those duties delegated to him for the due performance of which the master cannot relieve himself from liability, while he is a mere fellow servant, in reference to those acts in the performance of the work not within the personal duties of the master. *Lindvall v. Woods (Minn.)* 48 N. W. 1032; *Callan v. Bull (Cal.)* 63 Pac. 1017; *Maat v. Kern (Or.)* 34 Pac. 230; *Martin v. A. T. & S. R. Co.* 166 U. S. 299, 41 L. ed. 1051; *Cavanaugh v. Centerville Block Coal Co. (Iowa)* 109 N. W. 303.

Edward T. Burke, for respondent.

NOTE.—Authorities discussing the question of the excessiveness of verdicts for personal injuries not resulting in death are collated in a note in *L.R.A.1915F*, 40.

ROBINSON, J. This is a personal-injury suit in which the plaintiff recovered a verdict for nearly \$4,000. In November, 1917, defendant owned and operated a coal mine in McLean county. It is a side-hill mine, from which the coal is taken by small cars running on a horizontal track of wooden rails. The rails were about 2 feet apart and were on the level ground and on a dump of mine slack, and then, for about 20 feet, on a trestlework. The rails laid on the trestle were about 6 feet above the ground. There was no flooring between the rails or on the outer edge of the rails. The mine was operated by filling small cars with coal, then pushing or pulling them to the outer end of the rails, and dumping the coal into a chute or wagon. The plaintiff was in the employ of defendant, and, on the day of the accident, he and the superintendent pushed out a car of coal to the end of the track. Then, as the gauge of the car was a little too narrow, the right front wheel of the car fell down between the tracks. The superintendent ordered the plaintiff to go forward and replace the wheel. The plaintiff went forward, stood on the narrow track or rail, and attempted to lift the same, but could not do it because the flange of the wheel was caught on the track. Then he stepped across onto the other track or rail and pulled on the left front wheel, and then the right hind wheel fell between the tracks. As the plaintiff stood on a narrow rail and had to balance himself by holding onto the car, and as there was no footing between the rails, the lurch of the car threw him on his back across the track on the right side of the car. He fell down the chute. His lower rib was fractured, and he was badly injured and disabled. He suffered much pain, some expense in doctoring, and the impairment of his working capacity, and so the jury assessed his damages at \$4,000; and, though the damage appears rather excessive, that is not sufficient cause for disturbing the verdict. It is quite probable the plaintiff would have settled for half the sum if he could have obtained it without incurring the future expense of an action and an appeal to this court. Where a party has to recover his damages at the end of a lawsuit, the expense is always a matter of some consideration.

The law is simple:

One who, for a good consideration, promises to serve another must perform the service, and must use ordinary care and diligence therein. Comp. Laws § 6112.

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An employee must substantially comply with the directions of his employer concerning the services in which he is engaged. Comp. Laws § 6115.

An employer is not bound to indemnify his employee for losses suffered in consequence of the ordinary risks of the business. Comp. Laws § 6107.

An employer must, in all cases, indemnify his employee for losses caused by the former's want of ordinary care. Comp. Laws, § 6108.

Much is said concerning the proximate cause of the accident, and it is true that the first wheel falling from the track did no injury to any person. It was merely the remote cause of the accident. The proximate cause was the direct result of an attempt to replace the wheel upon the track, and in making the attempt the plaintiff acted under the direct orders of the superintendent and manager of the mine. The plaintiff stood on a narrow track, lifting a corner of the car and holding onto it for support, when the car gave a lurch and the plaintiff was thrown over because there was no footing between the tracks. If there had been some flooring between the tracks, as there should have been, then plaintiff's left foot would have automatically moved to the left and onto the flooring, and that would have steadied him and prevented his falling. In trying to adjust the car and replace it on the track, the plaintiff had a right to obey and trust the orders of the superintendent who stood over him. The superintendent had no right to order, or even permit, him to do what was dangerous, or to work in an unsafe place. For the fault of its superintendent and manager, the defendant must answer in damages according to the verdict of the jury.

Affirmed.

CHRISTIANSON, Ch. J., and BIRDZELL, J., concur.

GRACE and BRONSON, JJ., concur in the result.

CHRISTIANSON, Ch. J. (concurring). The contention of the appellant is: (1) That its motion for a directed verdict should have been granted; (2) that the court erred in its instructions; and (3) that the verdict is excessive.

In my opinion the questions of negligence, contributory negligence,

and proximate cause were for, and properly submitted to, the jury. I find no prejudicial error in the instructions; and I do not believe that the verdict can be said to be excessive as a matter of law. Hence, I concur in an affirmance.

PER CURIAM (upon petition for rehearing). The appellant contends that the place where the plaintiff was hurt was purposely left without flooring and open for the reason that it was the place where coal was dumped into a chute; that it was, therefore, not negligence to have no flooring between the rails. It is furthermore urged that this court did not pass upon all of the specifications of error raised in the record, and that particularly the trial court erred in instructing the jury that the defendant admitted that the plaintiff was employed by the defendant at its mine.

The record again has been reviewed. The plaintiff was inexperienced; he was injured on the very first day when he was directed by the superintendent to take coal out of the mine by means of a coal car. Upon the record the questions of the negligence of the defendant in instructing and in directing the plaintiff to work in the place where he was injured, under the conditions then existing, both with respect to the car and the place where he stood, as well as the contributory negligence of the plaintiff in so doing, were fairly questions of fact for the jury. The complaint alleges that the defendant employed the plaintiff. The answer alleges that the defendant was the equitable owner and in possession of the coal mine, and that the plaintiff was there employed. The evidence shows that the plaintiff was employed by the superintendent of such mine. There is no evidence to disprove these allegations of both the complaint and the answer, or that the possession and control of the mine was in any other person than the defendant. The other instructions upon which error is predicated concern want of ordinary and proper care on the part of the plaintiff, and the award of damages for permanent injuries. These instructions, upon the record were properly given. The petition for rehearing is denied.

BENTLEY TAYLOR, Respondent, v. GRAND LODGE OF THE ANCIENT ORDER OF UNITED WORKMEN OF NORTH DAKOTA, a Corporation, and E. J. Moore, Its Grand Recorder, Defendants, MARGARET JANE DAVIS, Appellant.

(178 N. W. 130.)

Insurance—equity may regard all acts necessary to be done to change beneficiary as done.

1. Where the constitution, by-laws, or regulations of a fraternal order which issues benefit certificates providing for the payment of death benefits at the death of the member, prescribe the acts to be done, at the will of and by the insured, to effect a change of beneficiary, and the insured has done some of the acts to effect such change, but dies before the change is fully completed, and it is equitable to regard all he should have done to complete the change of beneficiary as done, a court of equity will so regard it, and give effect to his intentions to change the beneficiary, notwithstanding the acts done by the insured were not a full compliance with the requirements of the constitution, by-laws, etc.

Equity—equity regards as done all acts necessary to effect manifest intention.

2. Where it is plain that the insured has done all that he could do to effect the change of beneficiary in a fraternal benefit certificate, and unforeseen and unavoidable conditions and circumstances prevent the completion thereof, and, in equity and good conscience, the change should be effected to carry out the intentions of the insured, a court of equity will regard that as done which ought to be done.

Opinion filed May 12, 1920. Rehearing denied June 4, 1920.

NOTE.—For cases holding that where the intention of a member of a benefit society to make a change in beneficiaries was clearly shown, and he had done all that was within his power to carry out his intention, the fact that death intervened before he could conform to the rules of the association and express that intention formally should not, and would not, prevent a court of equity from enforcing that intent and making it effective, see notes in 34 L.R.A. (N.S.) 277, and L.R.A. 1915A, 580, on effect of death of assured before contemplated change of beneficiary is complete.

Appeal from a judgment of the District Court of Cass County, Honorable A. T. Cole, Judge.

Judgment affirmed.

Fowler & Green, for appellant.

A gift by a donor who is ignorant of the fact that he is giving cannot be sustained by a court. *A. O. U. W. v. Gandy* (N. J. L.) 53 Atl. 146.

Insured had no interest at all capable of being transferred by gift or assignment to respondent.

This is also the clear voice of authority. *M. W. A. v. Headle* (Vt.) L.R.A.1915A, 586; *Holland v. Taylor*, 111 Ind. 121, 12 N. E. 116; *Fink v. Fink*, 171 N. Y. 616, 64 N. E. 508; *Ireland v. Ireland*, 42 Hun, 212.

The member could not change the beneficiary by will, because the by-laws did not so provide, and the method prescribed by them was exclusive. *Flowers v. Lodge* (Tex.) 90 S. W. 526.

It is well settled that where the by-laws or Constitution of a mutual benefit society provide a method of making a change of beneficiary, a member in making a change must follow the method designated. 19 R. C. L. § 90, and cases cited in note 14; *Thomas v. Thomas*, 131 N. Y. 205, 30 N. E. 61; *McCarthy v. Lodge* (Mass.) 26 N. E. 866; *Fink v. Fink* (N. Y.) 64 N. E. 506; *Flowers v. Lodge* (Tex.) 90 S. W. 526.

The constitution, laws, and rules of the defendant lodge, relative to change of beneficiary, are not directory merely, but, on the contrary, they are mandatory and are made and intended for the benefit and protection of the lodge, the member, and the beneficiary. *Fink v. Fink* (N. Y.) 64 N. E. 508; *M. W. A. v. Headle*, L.R.A.1915A, p. 589; *M. W. A. v. Little* (Iowa) 86 N. W. 216; *Knights of Honor v. Narin* (Mich.) 26 N. W. 826; *A. O. U. W. v. Fisk* (Mich.) 85 N. W. 875; *Berg v. Damkoehler* (Wis.) 88 N. W. 606; *A. O. of Gleaners v. Burg* (Mich.) 130 N. W. 191.

Flynn, Traynor, & Traynor, for respondent.

"A policy of insurance upon life or health may pass by transfer, will, or succession to any person, whether he has an insurable interest or not, and such person may recover upon it whatever the insured might have recovered." Comp. Laws 1913, § 6629; 29 Cyc. 133.

Was the act or acts on the part of the decedent, the insured, suf-

ficient to clearly establish his intent, purpose, and will? And, if so, it is the duty of the court to make that intent, purpose, and will effectual by and through its order. *Ladies of Modern Maccabees v. Daley* (Mich.) 131 N. W. 1127; *Standard Life & Acci. Ins. Co. v. Cattin* (Mich.) 63 N. W. 897; *Grand Lodge, A. O. U. W. v. Beath*, 114 N. W. 662; *Great Camp Knights of Modern Maccabees v. Deem* (Mich.) 107 N. W. 447; *Titsworth v. Titsworth* (Kan.) 20 Pac. 213; *Noble v. Police Beneficiary Asso. (Pa.)* 132 Am. St. Rep. 783, 73 Atl. 336; *Fischer v. Malchow* (Minn.) 101 N. W. 602; *Supreme Council, R. A. v. Behrend* (U. S.) 62 L. ed. 1182; *Wandell v. Mystic Toilers* (Iowa) 105 N. W. 448; *National Amc. Assn. v. Kidgin*, 28 Mo. App. 80; *Walsh v. Sovereign Camp, W. E. (Mo.)* 127 S. W. 645.

"The whole matter seems to be rather a question of equity, and the stronger and better equity must prevail." *Grand Lodge, A. O. U. W. v. Noll* (Mich.) 51 N. W. 268; *Konigstein v. Finke* (Neb.) 163 N. W. 758; *Grand Lodge, A. O. U. W. v. Child* (Mich.) 38 N. W. 1.

Equity will consider that done which ought to have been done. Justice alone can be considered in a court of chancery, and technicalities never be tolerated except to obtain and not to destroy it, and the greater equity should always be allowed to prevail. *Martin v. Stubblings* (Ill.) 18 N. E. 657; *Grand Lodge, A. O. U. W. v. Kohler* (Mich.) 63 N. W. 897; *Lahey v. Lahey* (N. Y.) 66 N. E. 670.

The proceeds of a certificate of the insured in a mutual benefit insurance association may be disposed of by will. *Brinsmaid v. Traveling Men's Asso. (Iowa)* 132 N. W. 34; *Chistenson v. Mystic Shrine* (S. D.) 156 N. W. 581; *Supreme Council v. Priest* (Mich.) 9 N. W. 481; *Hall v. Allen*, 75 Miss. 175, 65 Am. St. Rep. 601, 22 So. 4.

In a majority of jurisdictions a parol gift of an insurance policy, accompanied by a delivery of the policy, is sufficient to constitute a valid gift *inter vivos*, and no written assignment thereof is necessary. There must, however, be either a delivery of the policy or a duly executed assignment thereof, to perfect the gift. 20 Cyc. 1203; *Gledhill v. McCoombs* (Me.) 45 L.R.A.(N.S.) 26, 86 Atl. 274; 17 Halsbury, 558; *Knowles v. Knowles* (Mass.) 91 N. E. 213; *Richmond v. Johnston* (Minn.) 10 N. W. 596; *Bacon, Ben. Soc. & Life Ins. p. 721 § 296*.

GRACE, J. This action is one by the plaintiff, claiming, as beneficiary, to recover the amount of a certain beneficiary certificate issued by the defendant to Robert Ryan.

The material facts in the case are substantially as follows: On the 18th day of February, 1909, the defendant, through its local lodge at Minnewaukan, North Dakota, issued to Robert Ryan, its benefit certificate No. 4140, in the sum of \$2,000.

In the certificate, when issued, Maggie Ryan, now Margaret Jane Davis, the appellant, was named as the sole beneficiary, and she now claims the proceeds thereof. Until Sunday, January 26, 1919, the certificate remained in the possession of Robert Ryan.

On the date last mentioned, and for sometime prior thereto, he was sick at a hospital in Devils Lake. At his request, the respondent had come to Devils Lake some days prior to the above date.

On the 25th day of January Edward Flynn, an attorney, at the request of plaintiff, prepared a will, which was signed by Ryan.

On January 26th, Flynn took the will to the hospital and read it to Ryan, who objected to the portion of the will which provided that the proceeds of the insurance certificate become a part of his estate, and stated that he desired the insurance to go to the plaintiff.

A new will was prepared, in which the insurance was not mentioned, and it was signed by Mr. Ryan. The plaintiff was not mentioned in the will.

It clearly appears from the testimony, that plaintiff did not wish to be mentioned in the will, and that he was not seeking, in any manner, to get any of Mr. Ryan's property. He acted, at all times, in the highest of good faith, and, at no time, used any influence to procure Mr. Ryan to will, or otherwise transfer, to him, any of his property; he was, in fact, reluctant to receive any of it.

The designation of the plaintiff as beneficiary was wholly and entirely the act of Ryan, who, at that time, was in possession of his mental faculties, which were, as the evidence shows, unimpaired.

On the back of the certificate there is printed, in a blank, a request for change of beneficiary. This, Flynn filled in, the plaintiff being designated beneficiary therein, and Ryan signed it on January 26th, in the presence of Flynn and one Brea and one Harriman, and the certificate, together with the will as revised, delivered to plaintiff.

At the time deceased executed the request for change of beneficiary, he was friendly to the plaintiff, and desired him to have the insurance.

On the afternoon of January 27th, Mr. Ryan died, and about eighteen days after his death, the certificate was presented, by plaintiff, to the local recorder, at Minnewaukan, and he affixed his signature and the seal of the local lodge to the request for the change of beneficiary, upon the back of the certificate.

The certificate was then, by the plaintiff, presented to the grand recorder, at Fargo, and payment thereon demanded; it was refused.

The application upon which the certificate was issued, as is usually the case in this class of insurance, provided that the rights of the insured, and the rights of the beneficiary, should, at all times, be subject to all laws, rules, and regulations of the order, as they then existed, or as might thereafter be adopted.

The defendant has brought the proceeds of the certificate into court, and is willing to turn it over to the beneficiary lawfully entitled to receive the same. The predominant issue in the case is which of the two is the rightful and lawful beneficiary, and entitled to receive the proceeds of the insurance policy.

The regulations of the lodge or order governing change of beneficiary read thus: "Any member desiring to change his beneficiary may do so in the following manner: *viz.*, he shall fill out the blank form on the back of his beneficiary certificate authorizing the change; he shall have his signature attested by the recorder of his lodge, and the seal of the lodge attached thereto, or attested by a civil officer having a seal, under his official seal, if such member cannot sign in the presence of the lodge recorder. When this is done, he shall deliver his beneficiary certificate to the recorder of his lodge, together with a fee of 50 cents. The recorder shall forward the said certificate and fee to the grand recorder, who shall make a record of the change on the books of the grand lodge, and shall issue a new certificate in lieu thereof, payable as directed on the back of the surrendered certificate. The new certificate shall bear the same number as the old one, which shall be safely filed and preserved."

It will be observed that the principal requirements of the regulation of the order providing for change of beneficiary are three; namely, that the insured fill out and sign the blank form on the back of the cer-

tificate, authorizing the change; second, that the signature be attested by the recorder of his lodge, and the lodge seal affixed, or attested, by a Civil officer having a seal, when the insured is unable to sign in the presence of the local lodge recorder; third, the delivery of the beneficiary certificate, with the attached request for such change, to the recorder of the local lodge, with a fee of 50 cents.

These are all the things required of him.

The forwarding of the certificate, with the fee, to the grand recorder, the making of a record of the change, on the books of the grand lodge, and the issue of a new certificate in lieu of the old certificate, are, respectively, duties exclusively belonging to the local and grand recorder, over which the insured has no control; and his acts, with reference to effecting a change of beneficiary in the certificate, should not be affected by the failure of either the local or grand recorder to perform the duties required of them by such regulation. We need give no further attention to the duties required of the local or grand recorder, but may proceed to the consideration of the requirements contained in the regulation, which relate to the acts to be done by the insured to accomplish a change of beneficiary.

There are numerous decisions of many courts, state and otherwise, which, in substance, hold that, where the by-laws or constitution of a mutual benefit society provide a method of making a change of beneficiary, that method must be pursued by a member making such change or designation. *Thomas v. Thomas*, 131 N. Y. 205, 27 Am. St. Rep. 582, 30 N. E. 61; *McCarty v. Supreme Lodge O. P.* 153 Mass. 314, 11 L.R.A. 144, 25 Am. St. Rep. 637, 26 N. E. 866; *Fink v. Fink*, 171 N. Y. 616, 64 N. E. 506; *Flowers v. Sovereign Camp*, W. W. 40 Tex. Civ. App. 593, 90 S. W. 526; *Modern Woodmen v. Headle*, 88 Vt. 37, L.R.A.1915A, 856, 90 Atl. 893; *Grand Lodge, A. O. U. W. v. Gandy*, 63 N. J. Eq. 692, 53 Atl. 145.

Appellant has cited these and many other cases, which largely sustain his contention in the principle we are discussing. The rule, as thus contended for by appellant, may be said, in a large measure, to be the general rule. To this general rule, however, there are some well-defined exceptions, which we will later analyze.

Before doing so, however, we think it would not be amiss to discuss, briefly, some of the aspects of the general rule. We are inclined to be-

lieve, even in the absence of any equities of the case which may appeal to the conscience of the court, that a substantial compliance with the requirements, similar to those above mentioned, is all that should, in a court of law, be required. Hence, if a member desiring a change of beneficiary, instead of filling out the blank on the back of the certificate, as required by the regulation of the lodge, should make it by a separate instrument, which would, in substance, comply with the requirements of such regulation, it would seem that would be sufficient compliance with that regulation.

It would seem, further, that, if proof of his signature were made by witnesses who subscribed their names to such change of beneficiary as such, that would be a substantial compliance with the requirements, that the instrument providing for change of beneficiary be acknowledged before the recorder of the local lodge, or a civil officer with the seal; for the only effect of the signing of the same before the recorder of the local lodge, or a civil officer, is to give proof of the execution of the instrument by which the change of beneficiary is effected, and it would seem that such proof would be just as clear and unimpeachable if made by the testimony of subscribing witnesses who, under oath, testified that such change of beneficiary, either a required to be made on the back of the certificate or in a separate instrument, was made, in their presence, by the insured.

It would seem that the truth of the making and execution of the instrument designating the change of beneficiary is that which is sought to be proved, and as high a degree of proof may be afforded by subscribing competent witnesses, as by the certificate of a civil officer, under his seal, or that of the recorder of the local lodge to which its seal is attached.

The instrument in question, that is, the change of beneficiary, is not such as is required by the laws of the state to be under seal, and, in the absence of fraud, and where there are no equitable considerations presented in the case, which would, or ought to, prevent the application of such a rule, it would seem a substantial compliance with the requirements of the regulations is all that ought to be required.

If it should be conceded, however, that the general rule is as appellant contends, and that a strict construction should be given to the regulation of the order above set forth, it nevertheless is true that

several well-defined exceptions to the general rule, three of which are set forth in 29 Cyc. p. 133, and are as follows:

(1) Where the society has waived compliance with its regulations, or estopped itself to assert noncompliance therewith.

(2) Where it is beyond the power of the member to comply, literally, with the regulations, as where the rules require a surrender of the original certificate, and it is impossible for the member to surrender it.

(3) Where the member has done all that he is required to do, and only formal and ministerial acts, on the part of the society, remain to be done, in order to complete the change, and the member dies before the performance thereof.

The same exceptions, in substance, are recognized in the case of *Conclave v. Capella*, 41 Fed. 1.

These exceptions represent the exercise of the powers of a court of equity, to minimize the harshness of the rule of law, which, perhaps, would otherwise be applicable.

The court, in that case, did well to exercise its powers of equity, and, in setting forth such exceptions, it did not exhaust its equitable powers, nor, perhaps, did it exhaust all the exceptions, nor did it define limitations beyond which no other court of equity may go.

We think, in addition to those three exceptions, a court of equity has the power to say, in a case such as this, that, where the insured has done all in his power, in accordance with the regulations of the order, to designate a change of beneficiary, and through unavoidable circumstances and conditions he is unable to complete the designation, in accordance with the rules, as in this case, by death, and in equity and good conscience such change ought to be regarded as completed, that a court of equity ought to regard that as done which ought to have been done.

Mr. Ryan died in the afternoon of the day following his execution of the instrument designating a new beneficiary. It is plain, and the evidence shows, it would have been impossible for him to have appeared before the recorder of the local lodge to have acknowledged it.

If he had mailed it to him, it might have reached him in time, but this is also exceedingly doubtful. He might have acknowledged it before a civil officer authorized to take acknowledgments, but this evidently was not known to Mr. Ryan, or if so, in his extremity, it was over-

looked; and he, no doubt, relied upon the ability of Mr. Flynn, his attorney, to have the change of beneficiary made in a proper and legal manner; and in the face of this fact, and that the same was signed by three witnesses, it was sufficient to make him feel secure that he had properly and legally made the change of beneficiary.

On the back of the certificate, just over the blank provided for use in effecting a change of beneficiary, is the following: "Change of Beneficiary. Note. When a member wishes to change the designation of his beneficiary (or beneficiaries), the following blank must be filled out, and the signature attested, under seal of the lodge, by the recorder, who sends the certificate, together with the required fee, to the grand recorder, who issues a new one containing the change desired."

It will be seen that no provision is made in the notice that the signature might be attested before a civil officer; neither does it require the insured to appear before the recorder, but requires only that the signature be attested by the seal of the recorder; nor does it require that it be attested in the lifetime of the insured.

The fact that the notice does not state that it might be acknowledged before a civil officer is sufficient reason to excuse its not having been so acknowledged, and the insured knowing that he could not appear before the grand recorder, and from said notice, he also had reason to believe that it was not necessary that he should, naturally would conclude the attestation by witnesses, such as was made, would be sufficient, and we think, under the circumstances, it was.

In consideration of the matters involved in this case, it must be kept in mind that Mr. Ryan had the sole power of designating a change of beneficiary. The lodge has no such power; it has no right in this regard; it has the right and power of making rules governing change of beneficiary, and when compliance is had with those rules, it could not exercise any discretion in making the change; in such case, it is merely a ministerial act upon its part, and where there is a substantial compliance with those rules, though the exact method of making the change provided in them is not strictly complied with, the lodge ought not to be heard to complain, unless it would be inequitable to allow substantial compliance with the regulations to prevail.

In this case, however, the lodge makes no complaint; so far as it is concerned, it assumes sufficient compliance with the regulations provided.

ing for the change of beneficiary has been accomplished. It does not object that compliance with its regulations has not taken place. It brings the money into court, and is willing that such beneficiary shall have it as the court may say is entitled to it.

We think, therefore, the lodge has waived any failure of compliance with its regulations in regard to the change of beneficiary.

The agreement between the lodge and the policy holder is a contract, and, in law and equity, is subject to the general rules of construction applied to contracts in general.

In cases such as this, no iron-clad rule can be enunciated. The most, and the best, that can be said in such a case is that, if the insured has done all in his power to comply with the regulation of the order, in such a matter as designating a change of beneficiary, but has not done all that the order requires, and it is equitable to give effect to his partially completed efforts to make such change, and if it plainly would result in great injustice if his partially completed acts were not regarded as completed, equity should regard that as done which ought to have been done; and we think that condition applies to this case, for equity is with the plaintiff.

On the other hand, if the insured, Mr. Ryan, had been a married man, and had he designated in the policy, when issued, his wife as the beneficiary, and the evidence would show that she had been a good, faithful, and dutiful wife, and if we further assume, for the purpose of illustration, that the evidence would show that, for a considerable period of time prior to the time of his death, the insured was in the company of a woman of ill repute and of bad character, and, under similar circumstances, as to the execution of the change of beneficiary in this case, he should designate such a one as the beneficiary, equity could refuse to give effect to the partially completed change of beneficiary, on the ground that it would be inequitable to do so; for a court of equity is a court of conscience, and the thing asked to be regarded as done, which ought to have been done, must appeal to the conscience of the court.

In the circumstances in this case, we do not think that the appellant at any time had any vested interest in the fund in question. It is true, we think, that, under the laws of the order, and, as well, § 5066, Comp. Laws 1913, the insured had no interest in the fund. He did, however,

have an absolute right of changing his beneficiary, and when he did the acts which the evidence shows, in regard to changing the beneficiary, we think a change of beneficiary was effected at the time they were done; and that, under the rule we have applied to this case, his acts were so complete in that regard, or to be regarded by the court so fully completed, as to result in effecting a complete change of beneficiary; and that the plaintiff is the beneficiary entitled to such found.

We, at this time, deem the question of whether or not, under the circumstances of this case, the delivery of the policy to the plaintiff constituted a gift from Mr. Ryan to him, needs no discussion, and we express no opinion thereon.

The material points in the controversy are such as we have already analyzed. We are fully satisfied that, under the circumstances in this case, the plaintiff is entitled to the fund, and that the judgment of the trial court, awarding the fund to him, is proper and right, and should be affirmed. It is affirmed.

The respondent is entitled to his costs and disbursements on appeal.

ROBINSON, BIRDZELL, and BRONSON, JJ., concur.

CHRISTIANSON, Ch. J. (concurring specially). Our statute provides that the payment of death benefits by a fraternal benefit society "shall be confirmed (confined) to wife, husband, relative by blood to the fourth degree, father-in-law, mother-in-law, son-in-law, daughter-in-law, stepfather, stepmother, stepchildren, children by legal adoption or to a person or persons dependent upon the member; provided, that if after the issuance of the original certificate the member shall become dependent upon an incorporated charitable institution, he shall have the privilege with the consent of the society to make such institution his beneficiary. Within the above restrictions, each member shall have the right to designate his beneficiary, and from time to time have the same changed in accordance with the laws, rules, and regulations of the society, and no beneficiary shall have or obtain any vested interest in the said benefit until the same has become due and payable upon the death of the said member; provided, that any society may, by its laws, limit the scope or beneficiaries within the above classes." Comp. Laws 1913, § 5063.

The facts relating to what was done by the insured to effect a change of beneficiary in the benefit certificate in controversy are fully set forth in the principal opinion prepared by Mr. Justice Grace. It will be observed that the insurer, the Grand Lodge of the Ancient Order of United Workmen of North Dakota, has raised no objection whatever to the mode in which the insured indicated his intention to change the beneficiary, but has signified its entire willingness that the money be paid over to the plaintiff as such beneficiary, in the event the court finds that he is entitled to receive it. While the question is not wholly free from doubt, I am inclined to the view that under the facts in this case the plaintiff, in equity, should be deemed to be the owner of the fund in controversy.

WILLIAM S. THOMPSON, Appellant, v. FRANK O. SMITH, Respondent.

(178 N. W. 430.)

Master and servant — trial — direction of verdict held error — power to direct verdict defined.

In this case plaintiff appeals from a judgment on a directed verdict. The verdict was directed on a motion which argues the merits of the case and covers nine pages of the record; and on the merits the motion was granted. That was error. The facts, which speak louder than words and the testimony of plaintiff were sufficient to sustain a verdict in his favor. On a motion to direct a verdict against a party his testimony should be taken as true, unless clearly false. The motion is in the nature of a demurrer to the evidence and the conceded facts. It does not question the legal sufficiency of the pleadings, which may be amended to conform to the evidence. It raises merely a question on the legal sufficiency of the evidence to sustain a verdict against the moving party. 38 Cyc. 1564-1569.

Opinion filed June 5, 1920.

Appeal from a judgment of the District Court of Kidder County; Honorable *J. A. Coffey*, Judge.

Judgment reversed and new trial granted.

E. T. Burke, for appellant.

Geo. H. Musson, Geo. W. Thorp, and Russell D. Chase, for respondent.

ROBINSON, J. This is a suit for a personal injury resulting from the explosion of a jacketed water heating stove in the basement of defendant's hotel at Steele, North Dakota. The plaintiff appeals from a judgment on a directed verdict.

The complaint avers that in April and May, 1919, at Steele, North Dakota, in a hotel there kept by defendant, the plaintiff was employed as janitor, porter, and general utility man; that in the basement of the hotel there was a water heating stove from which defendant had turned off the water without the knowledge of the plaintiff, and that in accordance with his employment and the directions or permission of defendant the plaintiff started a fire in the stove, when it exploded and seriously injured him. Before the close of the trial the plaintiff moved for leave to amend the complaint to conform to the facts by adding this averment: That the explosion was caused by the negligence of the defendant in obstructing the water pipes leading from the stove to the tank, and thereby preventing the cooling circulation of the water, and yet allowing some of the water to remain in the water jacket around the stove. The court denied the motion to amend, saying: I think if you allege that there was some water in the stove you must prove that by direct testimony. The ruling, as well as the reasoning, was clearly wrong. Pleadings are to be liberally construed and may be amended by asserting allegations material to the case and conforming the pleadings to the facts proved when it does not substantially change the claim or defense. Comp. Laws, §§ 7458-7482. The gist of the complaint is that the injury was caused by defendant's negligence; the gist of the answer is that it was caused by plaintiff's negligence. The proposed amendment relates to mere description and details regarding the negligence. The motion for a directed verdict should have been expressed in one simple sentence, yet it covers nine typewritten pages of the record. It is an elaborate argument on the merits of the case, and on the merits the motion was granted. That was all erroneous. The only question then or now presented is on the sufficiency of the evidences to sustain the verdict, that is, the sufficiency of the direct and circumstantial evidence submitted by the plaintiff, regardless of any conflicting evidence.

In the basement of the hotel there was a water tank, a furnace, and a small jacketed water heating stove. The purpose of the stove was to

heat water for hotel use, at small expense, when the furnace was not in use. When the stove is in use, it is like an island, completely surrounded by water. From a high pressure storage tank the water runs through an iron pipe into a space between the heater and its jacket, and as the water is heated it ascends through another pipe to the tank from which it is drawn as it is used. When in proper use the operation is automatic and labor saving.

In May, 1919, as the weather grew warmer, the furnace heating was discontinued, and as the colored man was continuously using hot water, his mind naturally turned to the water heating stove. He testifies: "I talked with Miss Jennie [the maid in charge of the hotel] about heating the water and asked her why we could not have a fire in the stove, and she said, 'The stove is all right.' All we need is to put the pipe on and have hot water. She said, 'The stove is all right, you can get a stove pipe and make a fire in it.' I spoke to Mr. Smith about it and he said, 'All right; all we need is to put the pipe on and have hot water.' He said, 'The stove is all right,' and for me to get the pipe and build a fire. I got the pipe, put it up, built a fire. Then I went upstairs, heard the pipe crackling, went down to see the fire, opened the top door of the stove, which was red hot. Then the stove blew up. It bursted. The ashes and cinders hit me in the face and eyes. I was stone blind and can only see out of my left eye."

As the testimony of the plaintiff is in no way improbable, on a motion for a directed verdict it should have been taken as true. It was for the jury to weigh the credibility of the evidence and to account for the explosion. It did not occur without a cause. In the burning stove it did not occur from gas, which fire instantly consumes. It must have been caused by superheated steam, which shows that the water was not completely drained and shut off from the stove, but it was shut off enough to prevent the inflow of water to cool the stove and the steam. In other words, the heating apparatus was not in working order, and that fact was not known to the plaintiff, and he was misled and lulled into a false security by the assurance that he had nothing to do only to fix the pipe and to build a fire.

As Smith knew, the plaintiff was a colored man, employed at \$35 a month to do menial work. His color, his meager wage rate, and his employment indicated that he was a person of rather inferior mental

capacity and not an expert in the use of a water heating stove. Hence he should have been treated accordingly. The defendant should have put the heating apparatus in proper condition and shown the plaintiff just how to use it. Defendant argues that plaintiff risked all the dangers of trying to use the heater because he did it for his own convenience and without orders. The answer is that so far as the evidence shows the plaintiff had a perfect right to consult his own convenience, to relieve himself from work and the burden of lugging and carrying the water for washing dishes, floors, and for the use of defendant and his guests.

Judgment reversed and new trial granted.

BIRDZELL and GRACE, JJ., concur.

BRONSON, J. I concur in result.

CHRISTIANSON, Ch. J. (concurring specially). The sole question presented on this appeal is whether the trial court erred in directing a verdict in favor of the defendant. I believe that under the evidence in this case the questions of negligence, contributory negligence and assumption of risk were for the jury. I do not believe, however, that it can be said as a matter of law that the defendant was negligent.

CAROLINA KUHN, Respondent, v. JOHN MARQUART, Appellant.

(178 N. W. 428.)

Breach of marriage promise — action based on breach of valid existing contract.

1. An action for breach of promise to marry is predicated upon the proposition that the defendant has breached a valid existing contract to marry.

Breach of marriage promise — burden of showing release from contract is on defendant.

2. Where defendant sets up as a defense that he has been released from the contract to marry, the burden of proof is on him to show such release.

Breach of marriage promise — burden of showing subsequent engagement of plaintiff to another held on defendant.

3. For reasons stated in the opinion, it is *held* that the court's instructions relating to the burden of proof were not erroneous.

Witnesses — cross-examination as to bastardy proceedings against defendant held not erroneous.

4. For reasons stated in the opinion, it is *held* that the court did not err in permitting certain questions to be propounded to defendant on cross-examination.

Opinion filed June 5, 1920.

From a judgment of the District Court of Logan County, *Graham, J.*, defendant appeals.

Affirmed.

Arthur B. Atkins, Scott Cameron, and W. S. Lauder, for appellant.

It is well settled that where a woman, under engagement to marry, breaks her contract by engaging herself to marry another man, the fact that the woman was engaged to marry at the time she entered into second contract is no defense in an action brought by the woman against the man who is a party to the second marriage contract. 9 C. J. p. 340, § 32; *Albertz v. Albertz* (Wis.) 47 N. W. 95; *Doubet v. Kirkman*, 15 Ill. 622; *Roper v. Clay*, 18 Mo. 383.

It is now the settled law of this state that where a party to an executory contract gives notice that he will not perform, the other party may treat the contract as at an end or may at once sue for damages for a breach thereof. This rule is applicable to marriage contracts. *Zatlin v. Davenport*, 71 Ill. App. 292; *Kurtz v. Frank*, 79 Ind. 594; *Adams v. Byerly*, 123 Ind. 368, 24 N. E. 130; *Halloway v. Griffith*, 32 Iowa, 409, 7 Am. Rep. 209; *Kennedy v. Roger*, 44 Pac. 74; *Lewis v. Tappan* (Md.) 47 L.R.A. 385; *Frost v. Knight*, L. R. 7 Exch. 111.

"A release from a marriage contract need not be expressed and may be inferred from the acts and statements of a party inconsistent with the existence of the marriage contract. 9 C. J. p. 331, ¶ 21.

George M. McKenna and Müller, Zuger, & Tillotson, for respondent.

If a letter properly directed is proved to have been either put into the postoffice or delivered to the postmaster, it is presumed, from the known course of business in the postoffice department, that it reached its destination at the regular time, and was received by the person to whom it was addressed. *Rosenthal v. Walker*, 111 U. S. 185, 28 L. ed. 395, 398.

If, after knowledge of the conduct and character of the woman, the man continues the original contract in force and makes a new contract to marry, he is bound to perform. *Snowman v. Wordwell*, 32 Me. 275; *Kelly v. Highfield (Or.)* 14 Pac. 744; 9 C. J. p. 351, § 6.

Even in a case where a woman has fraudulently concealed from the man the fact of having had a bastard child, and he recognizes his marriage promise after acquiring knowledge of her want of chastity, he is holden. 1 Bishop, Marr. Div. & Sep. § 217, p. 94; *Sheahan v. Barry*, 27 Mich. 218, 222-3; 9 C. J. p. 364, § 87.

In order to support a defense for release or abandonment of a contract of marriage, the evidence must clearly show that both parties were willing that the contract should be at an end. 9 C. J. p. 362, § 82.

CHRISTIANSON, Ch. J. The plaintiff sued the defendant for the breach of a contract of marriage and alleged, by way of aggravation of her damages, that she had been seduced by him. The defendant admitted the promise of marriage and averred that after such marriage contract had been made the plaintiff promised and agreed to marry one Nick Wolfe, and that by reason thereof the plaintiff broke her contract with the defendant and exonerated him from all obligations to marry the plaintiff. The case was tried to a jury upon the issues thus framed and resulted in a verdict in favor of the plaintiff. Judgment was entered pursuant to the verdict, and defendant has appealed from the judgment.

The undisputed evidence shows that plaintiff and defendant were members of neighboring families. At the time the alleged contract of marriage was made the defendant was about twenty-three years old and the plaintiff about eighteen. The defendant had repeatedly made propositions of marriage to the plaintiff, which she had refused on the ground that she was too young to marry. In the spring of 1916, the plaintiff, however, finally agreed to marry the defendant, and some time thereafter, under such promise of marriage, he seduced her. In the fall of 1916, the defendant went to Bismarck, North Dakota, to attend school. The plaintiff testified that before he left she informed him that she believed she was pregnant, and that defendant then again assured her to have no fear, that he would marry her. It appears that some time after defendant had gone to Bismarck,—to wit, on November 13, 1916,

one Nick Wolfe, accompanied by two other men, came to plaintiff's home, and said Nick Wolfe, through one of the men acting as spokesman, stated to plaintiff's father that said Nick Wolfe desired to marry the plaintiff. The father virtually accepted the proposition, and then submitted it to the plaintiff. The plaintiff testified that she refused to accept the proposal; that her father thereupon took her into another room and scolded her—(the father testified that he "threatened her with a whipping"), and that she finally stated that she would accept the proposal; that at the time she knew she was pregnant as a result of her relations with the defendant, and that she in fact had no intention of marrying Wolfe. Immediately thereafter the plaintiff and Wolfe, accompanied by two men, went in an automobile to the priest, where arrangements were made for an announcement of marriage in accordance with the custom prevailing in the Roman Catholic Church. Upon her return from the priest the plaintiff wrote a letter to the defendant advising him of her plight and pleading with him to come and help her. On the following Sunday, to wit, November 19, 1916, announcement of the engagement of the plaintiff and Nick Wolfe was made by the priest. The defendant was present, but the plaintiff was not in church. She remained at home. Her parents and brothers, however, attended church; and upon their return one of her brothers (several years her senior) found her weeping upstairs. In answer to his inquiry she informed her of her pregnancy. He informed their father. The father flew into a violent rage, and beat her, drove her out of the house and "chased her around the yard." She sought refuge in the barn. Later in the day the defendant was brought over at her request, and some conversation took place between them in the barn. There is positive testimony to the effect that after being informed of the whole situation he told her not to cry; that he would marry her after the child was born, if it "came according to his time." The defendant, however, denies this, and claims that he merely agreed to provide for the child. The defendant also denies that he received the letter written him by the plaintiff, although in other portions of his testimony he says, in effect, that he received it after he came back to Bismarck.

On this appeal defendant contends: (1) That the defendant became released from his agreement to marry the plaintiff by reason of her promise to marry Wolfe; (2) that this result followed regardless of

whether plaintiff's promise to marry Wolfe was obtained through coercion on the part of plaintiff's father, or was made voluntarily by her (3) that the court erred in instructing the jury that the defendant had the burden of proving that plaintiff's promise to marry Wolfe was made voluntarily; (4) that the court erred in admitting evidence relating to a bastardy proceeding against the defendant.

(1, 2) An action for breach of promise to marry is, of course, predicated upon the proposition that there was an existing valid contract to marry, which has been breached by the defendant. In determining whether there was such existing and valid contract, recourse must be had to the general principles applicable to all contracts. A valid contract to marry presupposes mutual promises by the parties thereto. "The consent of the parties to a contract must be: (1) Free; (2) mutual; and (3) communicated by each to the other." Comp. Laws 1913, § 5842. And "an apparent consent is not real or free when obtained through: (1) Duress; (2) menace; (3) fraud; (4) undue influence; or (5) mistake." Comp. Laws 1913, § 5844; see also 4 R. C. L. p. 154.

The contract to marry creates a recognized status between the parties, and doubtless a subsequent contract by one of the parties entered into to marry some other party constitutes a breach of the first contract, and operates as a release of the other party to the contract. This is so because, of course, the status of the parties fixed by the first contract is wholly inconsistent with the condition created by the second contract. It is unnecessary to determine whether or to what extent the so-called engagement of the plaintiff to Nick Wolfe might have operated, or did operate, as a breach of her contract to marry the defendant. Under the evidence, the jury was entirely justified in finding that the plaintiff never in fact consented to marry Nick Wolfe; that her apparent consent was not real; and that she never had any intention of marrying him. After her return from the priest she immediately notified the defendant of the unfortunate position in which she found herself placed (largely if not wholly through his fault). The jury was also justified in finding that the defendant in due course received the letter which plaintiff wrote him, and hence was fully aware of plaintiff's position at the time he heard the announcement by the priest of plaintiff's and Wolfe's engagement. In fact, in the ordinary course, defendant should

have received such letter before he left Bismarck. The jury was also justified in finding that the defendant renewed his promise to marry plaintiff, on November, 19, 1918, after he was fully aware of everything that plaintiff had done with respect to the so-called engagement to Wolfe. In the circumstances, we do not believe there is any merit in the contention that the court should say, as a matter of law, that the defendant became and is released from his contract to marry the plaintiff.

(3) It is further contended that the plaintiff, and not the defendant, had the burden of proving that the contract between the plaintiff and Nick Wolfe was not voluntary, and that the court erred in instructing the jury that this burden was upon the defendant. It is asserted that the defendant sustained his burden by proving that the plaintiff had in fact promised to marry Nick Wolfe, and that thereupon the burden shifted to the plaintiff to show that the contract to marry was not a valid one.

In this case the contract to marry, and the refusal of the defendant to carry it out, were admitted in the answer, and the defendant as an affirmative defense averred that he was released from such contract by reason of plaintiff's subsequent promise to marry Nick Wolfe. Unquestionably the defendant had the burden of showing that he had been released from his contract to marry the plaintiff. This burden rested upon him throughout the entire case. It is true "the burden of evidence" might shift to the plaintiff, but "the burden of proof" did not; it remained upon the defendant during the entire trial. See *Guild v. More*, 32 N. D. 432, 466, 467, 155 N. W. 44. "Where plaintiff has established a promise and a breach with loss, a prima facie case is made out, thus throwing on defendant the burden of vindicating himself; and hence it is incumbent on him to prove a release from the engagement or the unchastity of plaintiff subsequent to the promise; and where he relies on the immoral conduct of plaintiff as a defense, it is incumbent on him to prove that he renounced plaintiff on discovering such conduct, and that the contract to marry was broken on account thereof. But it has been held not necessary for defendant to prove a justification of a failure to marry on the particular ground alleged by him. Where defendant sets up a release, the burden of proof is on him to show such release." 9 C. J. p. 350.

In this case defendant's sole excuse for refusing to carry out his contract to marry the defendant was that she subsequently had agreed to marry Nick Wolfe. There is not even an intimation that plaintiff had given any other justification to the defendant for such refusal. She had concededly remained true and loyal to him. The defendant had been making love to the plaintiff for some time. She apparently was quite fond of him, but refused to accept his marriage proposals on account of her youth. Finally she agreed to marry him. Under such promise of marriage, defendant induced her to have sexual intercourse. She became pregnant. These facts are established by the undisputed evidence. The testimony relative to the plaintiff's promise to marry Wolfe, and the circumstances under which it was made, is intermingled with, and discloses, the circumstances under which it was made. The plaintiff had seen Wolfe only once before he made the proposal. He was a stranger to her. She was defendant's betrothed wife. She was carrying his child in her womb. For certain reasons their engagement was known to themselves alone. She first refused Wolfe's proposal; later, she in form, accepted. The circumstances of the acceptance have already been related. Considering the evidence as a whole, we do not believe that reasonable men in the exercise of their judgment and reason could have found that plaintiff voluntarily entered into the agreement to marry Wolfe. We believe the court might well have instructed the jury, as a matter of law, that she did not voluntarily promise to marry Wolfe.

(4) Nor do we believe there is any merit in the contention that the court erred in admitting proof relating to the bastardy proceedings against the defendant. The testimony was admitted under these circumstances: The defendant, on his cross-examination, testified that in the conversation he had with the plaintiff at the barn on November 19, 1918, he told her he would not marry her; but "if she was going to have a child (he) will keep track of that," and "I support it." He was then asked if bastardy proceedings were not brought against him after the child was born. He admitted that such proceedings had been brought; that the court ordered him to pay \$15 a month for the support of the child; that he did not pay anything until after the court so ordered, and that he had never given either the plaintiff or the child any-

thing except the payments so ordered. We fail to see any error in permitting such cross-examination.

The judgment appealed from must be affirmed. It is so ordered.

MAGDALENE TALBOTT, Respondent, v. WILLIAM EARL TALBOTT, Appellant.

(178 N. W. 283.)

Divorce—refusal to vacate decree for mistake held abuse of discretion.

A motion to vacate and set aside decree for divorce, taken by plaintiff against defendant, was made under and pursuant to the provisions of § 7483, Comp. Laws 1913.

The trial court made and entered an order denying the motion.

It is *held*, for the reasons stated in the opinion, that this was an abuse of discretion.

Opinion filed June 8, 1920.

Appeal from an order of the District Court of Stutsman County, Honorable *J. A. Coffey, J.*

Reversed.

C. S. Buck, for appellant.

A judgment dissolving the relation of husband and wife should never be granted except on the most positive showing, and more than in any other class of cases there should be offered the fullest opportunity for both parties to be heard. *Bank v. Brandon*, 19 N. D. 489; *Westbrook v. Rice*, 28 N. D. 325.

E. L. Foster and *E. T. Burke*, for respondent.

A trial court is vested with a large discretion, which should not be disturbed except for clear abuse. *Robinson v. Cannely*, 29 N. D. 291.

Mere forgetfulness of a party to an action is not sufficient ground for vacating or setting aside a judgment by default. 15 R. C. L. p. 707, art. 159; citing notes in Ann. Cas. 1914B, 587, and 43 L.R.A.(N.S.) 930.

NOTE.—For accident or mistake as ground for relief from divorce decree, see cases collated in a note in L.R.A.1917B, 459.

GRACE, J. This is an appeal from an order of the district court of Stutsman county, North Dakota, J. A. Coffey, Judge, denying the motion of the defendant for an order vacating the judgment entered in said action, on July 8, 1919, which order was made and entered on the 19th day of August, 1919. The action was one for divorce, and was based principally on a claim of cruel and inhuman treatment. It was commenced by the service of a summons and complaint on the 9th day of April, 1919. Defendant interposed an answer, which admitted that plaintiff was a citizen of the United States and a resident of the state of North Dakota for more than one year prior to the time of the commencement of the action, and it also admitted the marriage. The remainder of the answer consists of a general denial. The case was brought on for trial at the regular June, 1919, term of the district court in and for Stutsman county. At the time the case was called for trial defendant was not present. The defendant's attorney was present. It is clear, from the affidavits in support of the motion to vacate and set aside the judgment and for an order reinstating the case on the calendar, for trial on its merits, that defendant was not present at the trial of the case. It is also clear that plaintiff introduced her testimony in support of the allegations of the complaint, and that the defendant offered no evidence.

The court made findings of fact and conclusions of law in plaintiff's favor, and judgment was entered accordingly, on the 8th day of July, 1919. Thereafter defendant promptly made the motion above mentioned, and the same was set to be heard on the 21st day of July, 1919. The motion was made pursuant to the provisions of § 7483, which sets forth the causes for which a party may be relieved of a judgment taken against him through his mistake, inadvertence, surprise, or excusable neglect, if an application and motion for such relief is made within one year after the notice of entry of judgment. The defendant has brought his motion in due time, and it is supported by the affidavit of C. S. Buck, his attorney, and by his own affidavit. The defendant is a railroad man and resides in Jamestown. He was in Jamestown at the time the case was called for trial. He was at his attorney's office on July 1st, and was told that the case would be brought on for hearing a week from that date. On the morning of the 8th of July his attorney attempted to call him by phone at his residence, but found he had no

phone there. He then called the roundhouse and the master mechanic of the Northern Pacific Railway Company, attempting to locate him, but was unable to do so. The defendant's affidavit shows that he was laboring under a mistake as to the actual date of the trial, and his affidavit further shows and states that it was firmly fixed in his mind that he was told that the case would be brought on for trial on the morning of Wednesday, July 9, 1919. He further states that he had no intention of being in default by not appearing; that he firmly believes that he has a good and valid defense against plaintiff's claim; that he called at the office of C. S. Buck shortly after 2 o'clock in the afternoon of July 8, 1919, and Mr. Buck not then being in, he returned again at 4 o'clock, at which time he was told by Mr. Buck that the case had been up for trial in the forenoon. He states further that he has no telephone at his home, having had the same removed some time prior, and that he had not informed C. S. Buck, his attorney, of the exact location of his residence. The trial court promptly denied the motion and made an order to that effect, and this appeal is from that order.

As we view the matter, the defendant was not required to make an affidavit of merits in view of the fact that he had theretofore interposed an answer which stated a good defense. *Peterson v. Finnegan*, ante, 101, 176 N. W. 734. All that was incumbent upon the defendant was to show facts, by affidavit, in support of his motion, which would show and establish his mistake, inadvertence, surprise, or excusable neglect. It is our opinion that he made a sufficient showing in this regard. Surely the defendant made a mistake as to the date of the trial, and we think an honest mistake, and that his neglect or failure to appear at the trial was entirely excusable; and that it is apparent that he had no intention of permitting a decree to be taken against him.

The application to vacate and set aside the judgment, it is true, was addressed to the sound discretion of the trial court. This discretion, however, must be a clear, legal discretion in contradistinction to an arbitrary or mere mental one. In the circumstances of this case and the facts, which appear by affidavit in support of the motion, we arrive at the conclusion that the trial court abused its discretion in denying defendant's motion, and in making the order refusing to vacate or set aside the judgment and to again place the case upon the calendar for trial. Actions should be tried upon their merits. The law favors it.

It is more satisfactory and gives greater opportunity to secure justice to all parties concerned. Where it is clear that an action has not been tried upon the merits, and where the application is made under the above section, and the affidavits, as in this case, show clearly a reason for the failure to appear at the trial, and such application and motion are seasonably made and within the time prescribed, the trial court should hesitate to deny the application and the motion; for it is very certain that it is exercising a legal discretion and should be exceedingly careful not to abuse it. This is particularly true in a divorce action. The court, in this kind of case, should have all the knowledge it is possible for it to acquire and it should be fully advised, where possible, of all the claims of the respective parties. The statutes of this state set forth the ground for divorce, and one seeking a divorce must bring himself or herself within the provisions thereof, and must support their case by competent evidence. In addition to this, full opportunity should be given the opposing party to present that side of the case, where they have endeavored and are ready to do so within the time and the requirements of law.

The order appealed from is reversed, and the case is remanded for further proceedings, not inconsistent with this opinion.

Neither party shall recover costs and disbursements on appeal.

JACOB HERR, JR., Petitioner and Appellant, v. AUGUST W. HERR, Christian J. Herr, Christina Koth, Gottlieb Herr, Katharina Herr, Friedrich Herr, Edward Herr, Magdalena Herr, August Herr, Daniel Herr, Julius Herr, Bertha Herr, Gedion Herr, John Herr, Alvin Pudwill, Appellants, and SUSANNA MUNSCH HERR, Respondent.

(178 N. W. 443.)

Executors and administrators—wife's antenuptial agreement held not to deprive her of statutory exemptions.

Jacob Herr and Susanna Munsch Herr, prior to the time of their marriage, entered into a written antenuptial agreement, the validity of which for the purposes of this action is assumed but not decided, whereby she agreed that

in case of his death prior to hers, she should receive out of his estate the use of the homestead during her life, and the sum of \$2,000 and no more. *Held*, for reasons stated in the opinion, that, she is not thereby precluded from claiming or taking her exemptions under § 8725, Comp. Laws 1913, but, notwithstanding such agreement, she is entitled to such exemptions.

Opinion filed June 9, 1920.

Appeal from a judgment of the District Court of McIntosh County,
F. P. Allen, J.

Affirmed.

H. W. Platt, G. M. Gannon, and A. A. Ludwigs, for appellant.

An intended wife may, by an antenuptial agreement, release her claim or right to the statutory allowance given to widows out of their deceased husband's estate. 13 R. C. L. 1013; *Kroell v. Kroell*, 219 Ill. 105; *Houghton v. Houghton*, 14 Ind. 505; *Rieger v. Schnaible*, 81 Neb. 33.

The homestead right of one spouse in the real estate of the other, on the latter's death, may be barred by antenuptial contract. 13 R. C. L. 1014; *Appleby v. Appleby*, 100 Minn. 408.

If the husband was induced to contract the marriage on the strength of the wife's signature to an antenuptial contract, fairly obtained from her, she should be compelled to execute the agreement, and be estopped from claiming further out of her deceased husband's estate than is provided in the contract. *Zachmann v. Zachmann*, 201 Ill. 330, 94 Am. St. Rep. 180; *Kroell v. Kroell*, 219 Ill. 105, 76 N. E. 63; 16 Cyc. 390.

It is the cardinal principle that marriage settlements, executory in their nature, ought to be construed and molded in equity according to the intention of the parties citing. *Brown v. Slater*, 16 Conn. 192, 41 Am. Dec. 136; *May v. May*, 7 Fla. 207, 68 Am. Dec. 431; *Collins v. Phillips*, 259 Ill. 405; *McLeod v. Board*, 30 Tex. 238, 94 Am. Dec. 301; *Bank of Greensboro v. Chambers*, 30 Grat. 202, 32 Am. Rep. 661; *Diller v. Diller*, 141 Wis. 255, 124 N. W. 278.

I. A. Mackoff, John E. Burke, and W. S. Launder, for respondents.

It is the public policy of this state that wholesome exemption laws shall be enacted for the benefit of widows, orphans, and the poor and unfortunate generally. N. D. Const. § 208, Comp. Laws 1913, §§ 7729-7743.

"The waiver of a right of exemption before the appropriate time for claiming it is absolutely void." 9 Cyc. 480; Maxwell v. Reed, 7 Wis. 582; Crum v. Sawyer, 132 Ill. 466, 24 N. E. 956; Mandan Mercantile Co. v. Sexton, 29 N. D. 602, 151 N. W. 780, Ann. Cas. 1917A, 67; Arnegard v. Arnegard, 7 N. D. 475; Meyer v. Meyer (S. D.) 127 N. W. 596; Wentworth v. Wentworth, 69 Mo. 247; Mahaffey v. Mahaffey (Iowa) 17 N. W. 46; Re Deller (Wis.) 25 L.R.A.(N.S.) 751 and note; Riggs v. Sterling, 60 Mich. 643, 27 N. W. 705.

Exemption laws manifest a public policy, and therefore all contracts whereby the benefits accruing under such laws are waived are held to be absolutely void. Kneetle v. Newcomb, 22 N. Y. 249; Curtis v. O'Brien, 20 Iowa, 376; Moxley v. Ragan, 10 Bush, 156; Maxwell v. Reed, 7 Wis. 582; 18 Cyc. p. 1450 and cases cited under note 31; Thompson, Homesteads & Exemptions, § 440.

GRACE, J. This is an action to determine the validity of the judgment appealed from, which set aside to Susanna Munsch Herr, the widow of Jacob Herr, Sr., certain exemptions in the sum of \$1,500 claimed under Comp. Laws 1913, § 8725.

The material facts, briefly stated, are as follows: Jacob Herr, Sr., died at Wishek, McIntosh county, North Dakota, on the 11th day of December, 1916. At the time of his death he was a resident of that county, and owned real and personal property therein, which, according to the appraisal thereof in the probate proceedings had, aggregated the sum of \$48,000; and the probability is that it was worth considerable more. There survived the decedent, his widow, Susanna Munsch Herr, and several children and grandchildren, whose names appear in the title of the action, none of which children, however, are the offspring of the decedent and his surviving wife, but are the issue of each by former marriages. Jacob Herr, Sr., and Susanna Munsch Herr, were married July 17, 1913. On that day, and prior to their marriage, they signed a written agreement, which purports to be an antenuptial contract. The parties to this action stipulated that, for the purposes of this proceeding (which is one brought to have the exemptions specified in § 8725 set aside), and for no other purpose, that the antenuptial contract might be considered a binding one. The validity of the contract is in no way determined herein. That question is

not in fact, involved in this action, except as the contract is assumed to be legal for the purpose of determining the question with reference to the exemptions under the section above mentioned. It is conceded that Jacob Herr, Sr., and Susanna Munsch Herr, on the day of the marriage and before the consummation of the same, signed a written instrument denominated an antenuptial contract, which, in substance, provided that neither party should take any right, title, or interest in the property of the other; that at the time of their respective deaths the property of each should vest in the respective heirs of each; that neither should take property or property rights in the property of the other; that during the time they lived together as husband and wife they would mutually share and enjoy the rents and profits of their property; that in the event the husband should die first, the surviving wife should have the right of occupancy of the homestead, and, in addition thereto, received \$2,000 in cash, and no more. Since the death of her husband the widow has continued to occupy the homestead, although the same has not been formally set aside to her by the order of the county court. It is claimed by the appellant that the administrator has tendered to the surviving widow the \$2,000 mentioned in the contract. She denied this, and claims that the tender was conditional on her releasing all further claim upon her deceased husband's estate, which she refused to do. She maintains that under the law she is entitled unconditionally to the exemption claimed, and that, to have the same set apart to her, she was not required, as a condition precedent, to surrender any other right that she might possess. It is claimed by appellants that the surviving widow's separate property amounted to \$2,900. She maintains that it is not more than \$500. The amount thereof is immaterial to a decision of this case. At the time of the marriage Jacob Herr, Sr., was an old man and she was about sixty years of age. The sole question presented in this case is: Was it error in the district court to hold, as it did, that the wife, by signing the antenuptial contract, is not estopped to claim exemptions under the section above mentioned, and that she in no manner thereby waived them? We are of the opinion that the court did not err in this regard.

The actual validity of the antenuptial contract not, in fact, being a real issue in this case, other than for the purpose of determining the exemptions to which the surviving widow is entitled, it is not necessary

to enter into a discussion of the same further than to state whether or not an antenuptial contract is valid depends largely, if not altogether, on the attendant circumstances and conditions under which it is executed. If it is fair, reasonable, equitable, and just and in no way contravenes public policy, and it is fairly entered into, each having knowledge of its contents and knowledge of each other's property, we think that it might be legally entered into, and thus be a binding obligation of the parties. However, if it be conceded that such a contract is entered into and is valid, and that each of the parties is bound thereby, it does not dispose of the question of exemptions to which either is entitled in the other's property, by reason of the exemption laws. As we view the matter, that part of one's property which, after his death, the law sets aside as an exemption to those dependent upon him, as in this case his surviving wife, is no part of the property which passes by descent and distribution. The law, so to speak, reserves the exemptions out of his property, and it is the duty of the court, under the law, to set those exemptions aside to those entitled to them. The purpose of the exemption law is to set aside a certain portion of decedent's property for the use and benefit of those entitled to it, in order that they may not become dependent; that they may have support sufficient to provide them for a time with the necessities of life, and for the further purpose that they may not become a public charge to the state, thus perhaps imposing unnecessary burdens on it. As we view it, it is entirely unnecessary to lengthen the discussion of the subject and purpose of exemptions. They are understood, and need no elaboration. We have no hesitancy in stating, as this court has often heretofore stated, that § 8725 is an exemption statute. That and other exemption statutes have been so fully discussed, and construed in very recent decisions of this court, that further discussion here would be superfluous, and it is sufficient here to merely refer to those decisions, among which are: *Swingle v. Swingle*, 36 N. D. 611, 162 N. W. 912; *Fischer v. Dolwig*, 39 N. D. 161, 166 N. W. 793; *Krumenacker v. Andis*, 38 N. D. 500, 165 N. W. 524. The question of exemptions was under consideration in each of the foregoing cases and was quite fully discussed and analyzed; but in the last case above cited, the exemption statutes, including § 8725, are set forth and are fully discussed and definite conclusions reached in regard to each. The purposes and intent of those stat-

utes, as well as the public policy upon which they rest, is also there fully and fairly discussed, and we think the decision therein reached by a majority of this court, and in each of the other cases to which reference has just been made, is decisive of the question at issue in this case, and further discussion of the subject, in view of these decisions, would be neither beneficial nor useful.

The judgment entered in this case was proper and right, and should be affirmed, and it is affirmed.

The respondent is entitled to costs and disbursements on appeal.

ROBINSON, J., concurs.

BIRDZELL, J. I concur, but express no opinion on the amount of the statutory exemption.

BRONSON, J. (specially concurring). For purposes of this appeal the validity of the antenuptial contract is not questioned. The question presented solely involves the right of the widow to receive \$1,500, as a statutory widow's exemption, by reason of such antenuptial contract. I am of the opinion that, even though this antenuptial contract, by its terms, should be construed to apply to this statutory widow's exemption of \$1,500, it is unenforceable for reasons of public policy, concerning such statutory exemption of \$1,500. The judgment of the trial court should be affirmed.

CHRISTIANSON, Ch. J., concurs.

HELEN CLARK, Plaintiff, v. WILDROSE SPECIAL SCHOOL DISTRICT, a Municipal Corporation, Defendant.

(178 N. W. 730.)

Appeal and error — certification of question held to present nothing for exercise of supreme court's jurisdiction.

Where, during the progress of a trial, a question of law arises deemed by counsel and the court to be decisive of the case, and the question is certified

45 N. D.—32.

to the supreme court, under chapter 2 of the Session Laws of 1919, and the jury discharged, it is *held*:

Following Guilford School Dist. v. Dakota Trust Co. 46 N. D. —, 178 N. W. 727, and Stutsman County v. Dakota Trust Co. ante, 451, 178 N. W. 725, the record presents no question concerning which this court can exercise either its appellate or original jurisdiction.

Opinion filed June 14, 1920.

Appeal from District Court of Williams County, *Leighton, J.*
Remanded to district court.
U. L. Burdick, for plaintiff.
Wm. G. Owens, for defendant.

PER CURIAM. This is an action originating in the justice court of Williams county. The plaintiff sued for breach of contract of employment as a school-teacher and claimed to be entitled to wages as a measure of damages. From a judgment in her favor for \$192.40 the defendant appealed to the district court of Williams county. When the matter come on for trial in the district court before the judge and a jury, the facts with reference to the plaintiff's contract and her dismissal were stipulated in open court. The plaintiff was then brought upon the witness stand, whereupon the defendant's attorney objected to the introduction of testimony on the ground that the pleadings and stipulated facts showed that the plaintiff had no cause of action. After concluding the statement of objection, the defendant's attorney requested the court to certify to the supreme court the question of the power of a school board of a special school district to discharge a school-teacher for cause without a hearing for the purpose of determining the existence of sufficient cause. Plaintiff joined in the application, and the trial court thereupon suspended further proceedings in the matter, and ordered that the question be certified to the supreme court. The minutes of the court show that the jury was drawn and the case certified to the supreme court for the interpretation of the statute relating to the power of special school districts to discharge a teacher without cause or hearing, and the clerk's minutes of trial show that the case was certified to the supreme court, further proceedings suspended, and the jurors excused. The record presents no certificate

showing the determination by the trial court of the question of law attempted to be certified. Under the recent decisions of this court in *Guilford Schoot Dist. v. Dakota Trust Co.* 46 N. D. —, 178 N. W. 727, and *Stutsman County v. Dakota Trust Co.* ante, 451, 178 N. W. 725, no question is presented concerning which this court can exercise either its appellate or original jurisdiction under the Constitution. The cause is therefore remanded to the District Court for original disposition according to law.

CHRISTIANSON, Ch. J.. and BIRDZELL, BRONSON, and ROBINSON, JJ., concur.

GRACE, J., concurs in the result.

MARTIN RYKOWSKY, Respondent, v. GEORGE BENTZ, Appellant.

(178 N. W. 284.)

Judgment—district courts have inherent power to vacate fraudulent judgments.

1. An application to set aside a judgment obtained by means of fraudulent acts on the part of the plaintiff is not controlled by § 7483, Comp. Laws 1913. The district courts have inherent power to vacate fraudulent judgments.

Judgment—default obtained by false statements held to require vacation.

2. For reasons stated in the opinion, it is held that defendant's motion to vacate a default judgment in this case should have been granted.

Opinion filed June 14, 1920.

From an order of the District Court of Grant County, *Hanley, J.*, defendant appeals.

Reversed.

Jacobson & Murray, for appellant.

The order denying the motion to vacate should be reversed and the judgment should be vacated. *Whittaker v. Warren* (S. D.) 86 N. W.

638; Williams v. Fairmont School Dist. 21 N. D. 198; Mougey v. Miller (N. D.) 169 N. W. 735.

E. T. Burke, for respondent.

CHRISTIANSON, Ch. J. This is an appeal from an order of the District court of Grant county, denying an application made by the defendant, George Bentz, to vacate a default judgment rendered against him on the 21st day of July, 1917, and allowing him to answer the complaint of the plaintiff.

The complaint in this action alleges that the defendant wilfully, wrongfully, maliciously, and unlawfully shot and wounded three horses belonging to the plaintiff, with the intent to vex, annoy, and harm the plaintiff; that the plaintiff has demanded of the defendant settlement for the damages occasioned by said shooting, but that defendant has refused to settle the same, to plaintiff's damages in the sum of \$275, wherefore plaintiff demands judgment for treble damages as provided by § 10,050, Comp. Laws 1913. The summons and complaint were served March 28, 1917; on June 11, 1917, plaintiff's attorney made affidavit of default, and judgment by default was entered on the 21st day of July, 1917. On the 15th day of September, 1919, the defendant made an application to open the default. The application was supported by affidavits and a verified answer. In his affidavit defendant averred, among other things, "that the following are the facts in connection with the procuring of said judgment: That in the month of January, 1917, the said plaintiff fraudulently and falsely claimed and pretended that this defendant shot and killed three of his horses, and claimed to have several witnesses who could prove it, and further falsely and fraudulently claimed that he could recover big damages against this defendant, and that said horses were shot in the year 1915; that at said time this defendant did not have any witnesses, except himself, to prove otherwise; that the said plaintiff, at that time, offered to settle with this defendant for the sum of \$100 in full for said horses; that this defendant, believing and figuring it would cost him more than \$100 to defend the action, and for the purpose of saving trouble and expense to himself in so defending, accepted said plaintiff's offer of settlement of \$100, and pursuant to such settlement did then and there, on the 29th day of February, 1917, pay to the plaintiff the sum of

\$100 in the form of a check, bearing date the 27th day of February, 1917, which check is hereto attached and marked exhibit A; that this defendant did then and there verily believe that such was the end of plaintiff's claim; that prior to this time the said claim had been in the hands of one (——), attorney, for collection; that thereafter and on the 28th day of March, 1917, a summons and complaint in the above-entitled action was served upon this defendant by one G. E. Berg; that then and there, and on the same day, this defendant went and saw the plaintiff, Martin Rykowski, and asked him why he was suing him on said claim when it was settled, and the said Rykowski then and there informed this affiant that such was the fault of the said (plaintiff's) attorney (——), that he has forgotten to communicate to him, the said [plaintiff's attorney], the fact that the case was settled, but that he would see him right away and have the case dismissed; that the said [plaintiff's attorney] had no authority to start said action, and then and there informed this affiant that he could take his word for it that he would have [plaintiff's attorney] dismiss the said lawsuit; that shortly thereafter this defendant saw F. G. Boettcher, of Elgin, who this affiant believed was a lawyer, and showed the said papers to Boettcher, and told the said Boettcher about his interview and talk with the plaintiff Rykowski, and that the said Rykowski had promised to have [plaintiff's attorney] withdraw the action, and about his settlement with Rykowski; that the said Boettcher then and there told this affiant to pay no attention to the papers, but to throw them away, that in view of the fact he had settled with Rykowski, such was the end of it; that this affiant believed what the said Boettcher told him and paid no more attention to such summons and complaint." The affidavit further states that the defendant subsequently received by mail a certain paper from plaintiff's attorney; that he took such paper to Boettcher and was by him informed that it was a claim by said plaintiff's attorney for attorney's fees; that said Boettcher further stated that it was up to plaintiff to pay his attorney; that said defendant, relying on the information given by said Boettcher, thereupon threw said paper away and paid no further attention to it; that during all of said time the defendant could not read or write the English language,—nor can he do so at this time.

The plaintiff Rykowski made an affidavit, wherein he says that on

June 8, 1916, he swore out a criminal complaint against the defendant Bentz, and had him arrested for shooting the horses; "that in the month of February, 1917, the defendant George Bentz offered the affiant \$100 if he would drop it and refuse to prosecute said criminal case against him, the said defendant; that this affiant did accept the \$100, and drop and refuse to prosecute said case any further, and so informed said state's attorney of Grant county, North Dakota, I. N. Steen, sometime before district court convened at Carson, North Dakota, in July, 1917. That the above-mentioned criminal case is the case settled and dropped between this affiant and George Bentz, and that the \$100 were paid to and accepted by this affiant for dropping said criminal case against the defendant, and not for damages suffered by this affiant by reason of defendant's having shot affiant's three horses on November 30, 1915. That this affiant never agreed with George Bentz that said \$100 should be reimbursed to him for any damages suffered by reason of the shooting of said horses."

It will be noted that plaintiff admits that he received \$100 from defendant; but he claims that that sum was paid, not in settlement of plaintiff's claim for damages, but for a dismissal of the criminal action. The plaintiff does not, however, deny the statements in defendant's affidavit as to the conversation between the plaintiff and defendant after the summons and complaint had been served upon the defendant. Nor does he deny that in such conversation he told the defendant that the action had been commenced through the mistake of his attorney, and that he would inform said attorney that the matter had been settled, and see that the action was dismissed.

The plaintiff contends that the order appealed from must be affirmed:

(1) Because the application vacated was not made within one year after the defendant had notice of the judgment; and,

(2) That in any event, the granting or refusal of such application rested within the sound judicial discretion of the trial court, and that the order cannot be reversed unless the discretion has been abused.

Plaintiff rests his contentions upon the provisions of § 7483, Comp. Laws 1913, which provides, *inter alia*, that the court may "in its discretion and upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment, order or other proceeding taken against him through his mistake, inadvertence,

surprise or excusable neglect." This section has no application to this case. The defendant, in his motion, did not ask to be relieved from a judgment taken against him through his mistake, inadvertence, surprise or excusable neglect, but he asked that a judgment taken against him through the fraudulent acts of the plaintiff be vacated and set aside. If the judgment was taken against the defendant under the circumstances set forth in his affidavit, it was obtained through fraud, and would be subject to attack for that reason. See *Shary v. Eszlinger*, ante, 133, 176 N. W. 938. The power to set aside judgments obtained by fraud is not dependent upon § 7483, supra, but is inherent in all courts of record. *Black, Judgm. § 321; Williams v. Fairmount School Dist.* 21 N. D. 198, 129 N. W. 1027; *Whittaker v. Warren*, 14 S. D. 611, 86 N. W. 638. Hence the district court had power to vacate the judgment, notwithstanding more than one year had elapsed after defendant had notice thereof.

In the case at bar, the defendant, in his affidavit, asserted that the plaintiff promised to notify his attorney that the matter had been settled and see that the action was dismissed. This portion of the defendant's affidavit is not denied in any affidavits submitted by the plaintiff. Upon the record as a whole, we believe defendant's motion should have been granted. The order appealed from must, therefore, be reversed. Such will be the order of this court.

JOHN MILLER COMPANY, a Corporation, Plaintiff, v. HARVEY MERCANTILE COMPANY, Ltd., a Corporation, Sayre, Strong, Grain & Merchandise Company, a Corporation, Calgary Colonization Company, a Corporation, H. H. Phillips, A. J. Sayre, L. P. Strong, T. L. Beiseker, James T. Morris, Individually and as Trustee for the Corporations Hereinafter Named, Creditors of the Harvey Mercantile Company, Ltd., a Corporation; Tibbs, Hutchins, & Company, a Corporation; Empire Cream Separator Company, a Corporation; Marshall, Wells Hardware Company, a Corporation; Great Northern Implement Company, a Corporation; Northern Shoe Company, a Corporation; Pure Oil Company, a Corporation; Standard Oil Company, a Corpora-

tion; Singer Sewing Machine Company, a Corporation; International Harvester Company, a Corporation; Winston, Harper, Fisher Company, a Corporation; Patterson & Stevenson Company, a Corporation, also Known as T. W. Stevenson Company, a Corporation; Stacy Mercantile Company, a Corporation; F. Mayer Boot & Shoe Company, a Corporation; Twin City Separator Company, a Corporation; Northwestern Bedding Company, a Corporation; Miller, Watt, & Company, a Corporation, Defendants.

(178 N. W. 802.)

Judgment—cause of action may be used for offense or defense but not for both.

1. One who possesses a cause of action which may be used affirmatively, or as a defense, may use it for purposes of offense or defense, but he cannot do both, when it serves thereby to compel the obligor of the debt to answer or respond twice for the same claim.

Action—election of remedies—judgment—two inconsistent remedies cannot be asserted; causes may not be split.

2. One may not assert and enforce two inconsistent modes of redress, and one may not split up his cause of action so as to compel thereby the obligator of the debt to answer or respond twice for the payment of the same claim.

Judgment—effect of enforcement of lien founded on debt as merging cause of action stated.

3. One may not claim a share of the same debt for the same amount without class because preferred, and then again within such class because not preferred. If, in resulting effect, one secures and enforces a lien including the debt, there is a merger of the cause of action for the enforcement of the original debt alone.

Judgment—when plea of *res judicata* available stated.

4. The bar or plea of *res judicata* is available between the same parties and their privies upon every question, issue, claim, and defense presented in a former suit.

Judgment—use of debt as defense to action by third party held to estop enforcement.

5. In an action of sequestration, where the plaintiff seeks to recover on its debt, evidenced by a judgment, out of the assets of an alleged insolvent corporation, alleged to have been transferred unlawfully and preferentially, and upon the liability of the officers and directors of such corporation, by reason

thereof; and where it appears that the debt upon which recovery is sought was formerly evidenced by certain notes secured by chattel mortgages upon certain elevator property, and that, in an action of conversion of such property brought by one of the defendants, claiming title through a bill of sale from such alleged insolvent corporation, the plaintiff asserted in defense the same debt, the lien of its chattel mortgages, and the unlawful preferential character and the illegality of the transfer so made through a bill of sale, without consideration, all to defeat the right of such defendant in the conversion action; and where, further, it appears that, by reason thereof, the plaintiff asserted and enforced the same debt, or some part thereof, and the lien of its mortgages beyond mere mitigation of damages,—it is *held*, upon the principles of law hereinbefore stated, that the plaintiff is estopped to enforce this same debt in such action.

Opinion filed May 18, 1920. Rehearing denied June 15, 1920.

Action in the nature of sequestration proceedings in District Court, Wells County, *Coffey, J.*

From a judgment of dismissal the plaintiff has appealed and demands a trial *de novo*.

Affirmed.

Pierce, Tenneson, & Cupler, for plaintiff.

A second mortgagee may maintain an action for conversion against the first mortgagee for the wrongful conversion of the property covered by two mortgages, and recover as damages the value of the property converted, up to the amount due on his lien, less the amount due upon the prior liens held by the first mortgagee. *Lovejoy v. Bank*, 5 N. D. 623, 67 N. W. 956.

If, in this case, it appeared that the amount of defendant's mortgage liens exceeded the value of the property, then plaintiff would have suffered no damage, and direction of a verdict against him would have been proper. *Clendening v. Hawk*, 8 N. D. 423; *Cook v. Loomis*, 26 Conn. 483; *Chamberlin v. Shaw*, 18 Pick. 278; *Brewster v. Silliman*, 38 N. Y. 423; *Reynolds v. Shuler*, 5 Cow. 323; *Stone v. Chicago, M. & St. P. R. Co.* 53 N. W. 191; *Force v. Peterson Mach. Co.* 17 N. D. 222.

Although an insolvent corporation may, as a general rule, prefer certain of its creditors, and its assets are not, to that extent, a trust

fund in the hands of its directors, such assets are a trust fund as against the individual claims of the directors themselves.

3 Clark & M. Corp. § 786, pp. 2411, 2419; 8 Thomp. Corp. § 6207, p. 683; Buck v. Ross, 68 Conn. 29, 57 Am. St. Rep. 60 and note pp. 66, 77, 78; Bosworth v. Allen (N. Y.) 55 L.R.A. 761.

These courts declare a preference to a creditor who is also a director or managing officer of the corporation illegal and void. Tatum v. Leigh, 136 Ga. 791, 72 S. E. 236, Ann. Cas. 1912D, 216; Beach v. Miller, 130 Ill. 162, 17 Am. St. Rep. 291 and note, 22 N. E. 464; Warren v. Columbus First Nat. Bank, 149 Ill. 9, 25 L.R.A. 746, 38 N. E. 122; Atlas Nat. Bank v. More, 152 Ill. 528, 43 Am. St. Rep. 274, 38 N. E. 684; Illinois Steel Co. v. O'Donnell, 156 Ill. 624, 31 L.R.A. 265, 41 N. E. 185, 47 Am. St. Rep. 245; Blair v. Illinois Steel Co. 159 Ill. 350, 31 L.R.A. 269, 42 N. E. 895; Campbell Printing Press, etc., Co. v. Marder, 50 Neb. 283, 61 Am. St. Rep. 573, 69 N. W. 774; National Wall Paper Co. v. Columbia Nat. Bank, 63 Neb. 234, 56 L.R.A. 121, 88 N. W. 481; Hill v. Pioneer Lumber Co. 113 N. C. 173, 21 L.R.A. 560, 37 Am. St. Rep. 621, 18 S. E. 107.

The prevailing rule is that the property of an insolvent corporation is a trust fund in such a sense as to preclude the directors and officers of the corporation from dealing with it in such a manner as to secure preference for themselves. Note to Buck v. Ross, 57 Am. St. Rep. pp. 77, 78.

A corporation may, in the absence of actual fraud, prefer bona fide debts due its directors. Note to Furber v. Williams-Fowler Co. (S. D.) 15 Ann. Cas. 1221.

The rule applies to debts of the corporation for which the officers or directors are liable as sureties or guarantors. National Wall Paper Co. v. Bank, 56 L.R.A.(N.S.) 121; Blair v. Illinois Steel Co. (Ill.) 31 L.R.A. 269; 5 Thomp. Corp. p. 5128, § 6503. See also Taylor v. Mitchell (Minn.) 83 N. W. 418.

Bangs & Robbins, for respondents.

F. B. Dodge and *Edward P. Kelly*, for Geo. V. McLaughlin and H. B. Murphy, executors of the estates of James T. Morris, deceased, and the defendant creditors of the Harvey Mercantile Company, Ltd., defendants and respondents.

Bangs & Robbins, for Harvey Mercantile Company, Ltd.

If the defendant makes use of the claim against the plaintiff as a set-off or counterclaim, the same is disposed of by the judgment rendered in that action; he cannot split the demand, using part of it as a set-off or counterclaim and the balance to sue upon a separate action. 23 Cyc. 1163-1201 et seq.; 1 Van Fleet, Former Adj. 438; 15 Standard Enc. Proc. 546; 1 Sutherland, Damages, 3d ed. 186, 187, 189; Freeman, Judgm. 224-277; Inslee v. Hampton, 11 Hun, 171; S. Del. Villamil v. Merced, 152 C. C. A. 136, 239 Fed. 86; Evans v. Maskey, 189 Ala. 283, 66 So. 3; House v. Donnelly, 7 Ala. App. 267, 61 So. 18; Brown v. Bank, 66 C. C. A. 293, 132 Fed. 450; Watkins v. Bank, 67 C. C. A. 110, 134 Fed. 36; Hagle v. Smith, 136 Iowa, 32, 113 N. W. 556; O'Connor v. Varney, 10 Gray, 231; Biere v. Fritz, 37 Kan. 27, 14 Pac. 558; Richards v. Randall, 4 Gray, 53; Sargent v. Fitzpatrick, 4 Gray, 511; G. T. M. Co. v. Farmer, 27 Minn. 428, 8 N. W. 441.

Where a purchaser sets up a breach of warranty as a defense to one of a series of notes given for purchase price of a machine, he cannot set up such breach as a defense to subsequent suits on the other action. Geiser Mach. Co. v. Farmer, 27 Minn. 428, 8 N. W. 144; Furneaux v. Bank, 39 Kan. 144, 17 Pac. 852; Knorr v. Reaper Co. 23 Neb. 636; Case Mfg. Co. v. Moore, — N. C. —, 10 L.R.A.(N.S.) 734, 57 S. E. 213.

Any action brought to enforce the liability created by § 4544 is premature until the happening of the event which imposes the liability upon the defendants. Topeka Paper Co. v. Publ. Co. 7 Okla. 220, 54 Pac. 455; Swaford Bros. v. Owens, 37 Okla. 616, L.R.A.1916C, 189, 133 Pac. 193.

BRONSON, J. *Statement*.—This is an action in the nature of a statutory sequestration proceeding. The plaintiff has appealed from a judgment of dismissal. This case was before this court formerly upon an appeal from an order overruling a demurrer to the complaint. 38 N. D. 531, 550, 165 N. W. 558. This court then held the complaint to state a cause of action in that it not only charged preferential conveyances made, but also a joint scheme and conspiracy to place property and assets of the Harvey Mercantile Company beyond the reach of

he plaintiff and other creditors similarly situated, and to divide such assets among certain persons. It is unnecessary to restate the allegations of the complaint rather fully stated in the former opinion, to which reference is made. The plaintiff's cause of action is grounded upon two claims:

A judgment for \$6,605.50 rendered July 23, 1912, upon which there is a claimed balance of \$4,665.38 and interest, and a judgment for \$567.49 rendered February 23, 1913,—both against the Harvey Mercantile Company, a corporation.

After the determination of the former appeal the defendants, including the Harvey Mercantile Company and other creditors concerned, interposed answers, wherein the judgment of \$567.49 and interest is admitted to be due and owing, but, concerning the larger judgment, it is alleged that there is nothing due thereon. In this regard it is alleged that in May, 1913, one Phillips, a defendant herein, instituted an action against the plaintiff herein to recover \$6,000 damages for the conversion of certain twin elevators at Harvey, formerly owned by the Harvey Mercantile Company; that in such action plaintiff asserted, by way of counterclaim and equitable set-off to defeat such conversion actions, the indebtedness and certain chattel mortgages upon such elevators which stood as security therefor; that such indebtedness was reduced to the larger judgment herein by an action at law; that by reason thereof such larger judgment was barred and paid. It appears in the record that in October, 1909, the Harvey Mercantile Company gave certain notes to this plaintiff; that to secure the same, in August and September, 1910, it executed certain chattel mortgages on its one-half interest in the elevator property mentioned. That subsequently, in January, 1912, this Mercantile Company conveyed by bill of sale its interest in the elevator to one Stricker, who thereafter, on March 21, 1912, likewise conveyed by bill of sale to Phillips, who thereupon took possession. In April, 1912, this plaintiff commenced an action against the Mercantile Company to recover judgment on such notes, and under a writ of attachment seized the elevator property, through the sheriff, from the possession of Phillips. In July, 1912, judgment was rendered on such notes for \$6,605.50. In August, 1912, the elevator property was sold under the attachment and a special execution

upon the judgment for \$2,000. This amount was credited upon the judgment.

In this action, instituted by Phillips, judgment was finally rendered, in August, 1914, dismissing the action upon the findings, generally stated,—that this plaintiff was entitled to offset and recoup any claim of Phillips to the full amount of the debt secured by such chattel mortgages; that the amount of the debt so secured far exceeded the value of the property, as found by the court to have been converted by the defendants; that Phillips suffered no damage through that conversion; that the bills of sale made by the Mercantile Company and Stricker were made without consideration, and in order to secure Phillips for the amount of certain indebtedness of the Harvey Mercantile Company personally guaranteed by him and for which he claimed to be personally liable. That such bills of sale were made in violation of the penal statutes of the state concerning the sale and transfer of mortgaged personal property without the consent of the mortgagor.

This action herein was instituted in April, 1916. It came on for trial in July, 1919. Before the introduction of any evidence, the defendants moved to dismiss the action upon the grounds, generally stated, that the larger judgment in question had been satisfied and discharged prior to the commencement of this action through using the same as a defense and set-off in the Phillips action; that this action was prematurely brought before the dissolution of the Mercantile Corporation and was furthermore barred by the Statute of Limitations enacted pursuant to chapter 100, Sess. Laws 1919. Before the trial court disposed of the motion, the defendants tendered in open court \$825 in payment of the small judgment, together with the taxable costs, and a deposit was made with the clerk of court of such amount. The defendants also requested the trial court to take judicial notice of its action and proceedings in the Phillips case, and offered in the record the judgment roll of the Phillips case. The court finally sustained the motion of the defendants, and thereupon findings were made for the dismissal of the action upon which the judgment herein has been rendered. The plaintiff demands a trial *de novo*.

Questions.—The plaintiff challenges the action of the trial court upon the following questions:

1. Is the larger judgment barred by reason of its assertion as a defense in the Phillips conversion suit?

2. Is the action barred under the Statute of Limitations contained in chapter 100, Sess. Laws 1919?

3. Can the present causes of action be maintained under §§ 4543 and 4544, Comp. Laws 1913, prior to a dissolution of the corporation by a judgment of court?

Contentions.—Concerning the first question the plaintiff maintains that there was not an assertion of the larger judgment in the Phillips conversion action as a counterclaim or set-off, but merely the pleading thereof in mitigation of damages as expressly provided by law; that the bar or plea of *res judicata* cannot be used in this action, where the Mercantile Company was not a party in the Phillips conversion action; that, furthermore, in the Phillips conversion action, Phillips had no right nor title upon which to maintain conversion by reason of the invalidity of the transfer to him, and that in any event Phillips suffered no damage, because the interest in the elevators to which he succeeded under the bills of sale was of no value because less than the amount of plaintiff's liens thereupon.

On the other hand, the defendants contend, upon familiar principles of law, that one may not split his cause of demand and may not first use the same as a defense and thereafter as a sword. That in the Phillips action the plaintiff did use this debt, which is the gist of the action, as a defense to defeat Phillip's cause of action, and now seeks again to use this same debt in an affirmative action to compel payment from the defendants, including Phillips, covering a benefit which it has already received through the assertion of its defense in the Phillips action.

Opinion.—The defendants have duly tendered payment of the smaller judgment. Fairly and frankly, upon oral argument the plaintiff's counsel practically concede that an issue of law is alone presented; that, if the larger judgment be not enforceable, the judgment of the trial court should be affirmed.

It is evident, that the main purpose of this action is to enforce collection of *the debt* evidenced by the larger judgment.

Prior to its reduction to judgment, *this debt* was evidenced by

promissory notes and chattel mortgages securing the same upon the elevator property concerned.

Prior to the institution of the Phillips conversion action, proceedings had been begun and were restrained to foreclose the lien of such chattel mortgages. Thereupon the action at law was instituted to recover on such notes and the elevator property in question attached. The larger judgment herein was secured. Pursuant thereto, this elevator property, under attachment and execution proceedings, was sold; through such action, Phillips was dispossessed of the elevator property, and the same was sold to this plaintiff for \$2,000, which amount was credited upon the judgment at law.

When Phillips instituted the conversion action what rights and remedies did this plaintiff then possess? At that time the acts, of which the plaintiff complains in this proceeding, had occurred. The debt evidenced by this larger judgment was then unpaid except as to the amount of \$2,000. The preferential conveyances and dispositions of the property of the Harvey Mercantile Company, if unlawful, had then been made. The acts and liabilities of the directors and officers of such Mercantile Company, including that of Phillips, had then occurred and accrued. At that time the plaintiff might then have maintained this action to enforce the collection of its larger judgment against the defendants, including Phillips, just as it now seeks to maintain it. Such action, if maintainable then, would have reached, through sequestration proceedings, the property of the Mercantile Company, including that which was transferred to Phillips under the bills of sale questioned.

The bills of sale in question were made prior to the attachment and judgment secured at law by the plaintiff.

Clearly this plaintiff, relying solely upon such judgment at law, was liable to Phillips for conversion, unless, in defense, it could show that the lien of its mortgages defeated Phillips' interest, or that the elevator property so sold in fact and in equity still was the property of the Mercantile Company.

Did this plaintiff then use this affirmative cause of action, then existing, and this debt, then evidenced by the larger judgment, as a shield to protect itself in the possession of the elevator property secured under the execution proceedings? The plaintiff maintains that it

simply used this debt, secured by a lien, in mitigation of damages as the statute permitted, and that this, in and of itself, defeated Phillips' right to recover, because he had suffered no damages. This the plaintiff had the undoubted right to do. *Lovejoy v. Merchants' State Bank*, 5 N. D. 623, 627, 87 N. W. 956; *Clendenen v. Hawk*, 8 N. D. 419, 423, 79 N. W. 878; *Force v. Peterson Mach. Co.* 17 N. D. 220, 222, 116 N. W. 84; *Comp. Laws* 1913, § 6721. It served, also, to deny to Phillips any recovery in damages, because the lien of such mortgages exceeded the value of this interest in the premises. *Kohn v. Davis*, 36 C. C. A. 253, 94 Fed. 288, 293; *Farrar v. Paine*, 173 Mass. 58, 53 N. E. 146. This right, independent of statute, was formerly recognized by the courts of this state equitably. See *Lovejoy v. Merchants' State Bank*, supra; *Force v. Peterson Mach. Co.* 17 N. D. 220, 222, 116 N. W. 84. This right, however, whether statutory or equitable, has not been extended so as to include the right to require the obligor of a debt to pay it twice. 23 Cyc. 1206.

Did the plaintiff in this action assert in the Phillips conversion action, beyond the mere defense of mitigation of damages, the affirmative cause of action (which is the basis of this action) to defeat such conversion action? This court so finds. In that action this plaintiff asserted the full amount of its debt, the present larger judgment. It asserted its lien through the chattel mortgages given to secure the same, to the full amount thereof. It asserted the position and status of Phillips and the purposes for which it was claimed that the bills of sale were illegally made to Phillips, both contrary to law concerning chattel mortgages and for purposes of creating unlawful preferences, and to hinder, delay, and defraud creditors, particularly this plaintiff, in the collection of its debt.

If such defense had not been asserted, Phillips would have prevailed in the conversion action. The plaintiff, however, would not have been precluded from maintaining this action or an action to enforce this debt which would reach and extend even to the property that Phillips would have received through such conversion action. *Its debt*, the present judgment, then would have remained wholly uncollected without any attempt having been made to assert its causes of action or modes of redress to enforce the same. Its defenses, in the Phillips action, are not answered by the contention that Phillips really had no interest

in the elevator property, and that the title which was concluded by the execution proceedings was simply the title of the Harvey Mercantile Company. In order to enforce its debt, the larger judgment, this plaintiff then possessed, under the circumstances, certain definite rights and remedies.

To defeat the right of Phillips and the conversion action it necessarily had to assert either its lien through the chattel mortgages, or the unlawful preferential character or the illegality of the transfer. It could enforce its lien and its debt as to this elevator property by asserting a lien, or it could enforce or seek to enforce its debt without the lien, but it could not adopt inconsistent modes of redress. If, in resulting effect, it enforced its lien, including the debt, it merged the cause of action on the original debt. 23 Cyc. 723. See *Miller v. Little*, 37 N. D. 612, 616, 164 N. W. 19. The fact that the use of these defenses comprehended and included the right to mitigate damages as permitted by the statute does not permit the plaintiff to escape the effect of the full assertion of such defenses.

By reason of its defense it secured and retained this elevator property which it could not have secured and retained under the sheriff's sale proceedings alone. To so secure and retain this property it saw fit to use the entire debt evidenced by the larger judgment and some of its affirmative cause of action then existing. The value of the property so obtained is undetermined by the findings of the court. It may have been equal to the entire amount of the debt. It may have been considerably less. In any event this plaintiff then realized and it secured an enforcement and a benefit under and concerning *its debt*, this larger judgment.

We are of the opinion that it is now barred and precluded from enforcing the collection of this debt upon its affirmative cause of action by reason thereof. The familiar principles of law apply, that causes of action may not be divided, and that one who has availed himself of a part of a single claim or obligation in an action or defense is estopped thereafter from enforcing the remainder of it. 23 Cyc. 1174, 1202. This follows the famous expression of Chief Justice Shaw in *O'Connor v. Varney*, 10 Gray, 231, that one cannot use the same defense first as a shield and then as a sword. 23 Cyc. 1163, 1201; *Brown v. First Nat. Bank*, 66 C. C. A. 293, 132 Fed. 450; *Watkins v. American Nat.*

Bank, 67 C. C. A. 110, 134 Fed. 36; Warburton v. Trust Co. of America, 105 C. C. A. 201, 182 Fed. 769, 775; Wagner v. Kohn, 140 C. C. A. 592, 225 Fed. 718, 722. This is simply the application of an equitable rule, that one should not be compelled to answer or be required to pay twice for the same claim. It may also be noted that, in the Phillips conversion action, the plaintiff asserted its right to retain and hold the elevator property, because it was a preferred creditor by reason of its chattel mortgage liens. In this action upon the same debt and for the same amount it asserts its right to maintain such action on such debt, because a general creditor. Well may it be asserted, upon similar principles, that one may not claim to share on the same debt and for the same amount without a class, because preferred, and then again within such class, because not preferred. One may not assert and enforce two inconsistent modes of redress. Roney v. H. S. Halvorsen Co. 29 N. D. 13, 20, 149 N. W. 688. Clearly the defendants in this action are entitled to assert the bar or plea of *res judicata* in the Phillips action. 23 Cyc. 1206; Miller v. Belvy Oil Co. 160 C. C. A. 223, 248 Fed. 83.

If, in the application of such principles, the want of full satisfaction accrues to the plaintiff, it is only because of its own actions, deliberately taken, in choosing the method of enforcing its claims and demands. The decision of this court upon the first question renders it unnecessary to consider the other two questions propounded. The judgment accordingly is affirmed, with costs to the respondent.

ROBINSON, J., concurs.

GRACE, J. I concur in the result.

BIRDZELL, J. (dissenting). I dissent. This is an equitable sequestration proceeding. The case was before this court once before on an appeal from an order overruling a demurrer to the complaint (38 N. D. 531, 165 N. W. 558), and it was then held that the complaint stated a cause of action. Thereafter answers were filed by the defendants, and the matter came on for trial in the district court. Before the tak-

ing of any evidence, however, the defendants moved that no evidence be received, and the trial court, taking notice of its records in other litigation, sustained the motion. Later, findings of fact and conclusions of law were signed and a judgment of dismissal entered. This appeal is from the judgment. So the case is not here for review of any disputed questions of fact, and involves merely the proper application of equitable principles.

Under the opinion of Mr. Justice Bronson it is held, first, that the plaintiff is precluded from maintaining this action on behalf of itself and the other general creditors of the Harvey Mercantile Company, because in a prior conversion action by Phillips against this plaintiff it asserted its lien on the property converted in mitigation of the damages claimed by Phillips, which lien was supported by the same judgment that the plaintiff relies upon here; and, second, that the plaintiff is precluded by reason of having so previously asserted its lien as to place itself in the position of a preferred creditor. It is said that, having placed itself in that position, it is now precluded from sharing with other possible general creditors on any portion of its indebtedness, because of a supposed inconsistency in the means of redress adopted. I am unable to concur in the holding upon either of these two propositions.

The reasons actuating the dissent upon these two propositions are, briefly stated, as follows: The findings in the conversion action show that Phillips had not been damaged, because the amount of the indebtedness for which the converted property was security was in excess of the value of the property, from which it would follow that Phillips had no equity. The finding is that the value of the elevator property was and is several thousand dollars less than the lien of the chattel mortgage. In these circumstances, it seems to me that equity requires only that the defendants in this action be given the benefit of the full value of the property taken by the John Miller Company in the manner indicated, and that this be applied upon the indebtedness. In other words, that the value of the converted property be applied to reduce plaintiff's indebtedness *pro tanto*. It must be remembered that the plaintiff used its indebtedness in the conversion action only for the purpose of mitigating damages, and not for the purpose of a counterclaim or offset upon which it would have been entitled to an affirmative judgment.

See 1 R. C. L. 343; *Huffman v. Knight*, 36 Or. 581, 60 Pac. 207; *Gahlert v. Quinn*, 35 Mont. 457, 119 Am. St. Rep. 864, 90 Pac. 168.

Neither is it apparent to me that the plaintiff, by relying upon the security it held upon the elevators, placed itself in a position inconsistent with its claim as a general creditor. By relying upon its security it did not assume the position of a preferred creditor, but only that of a secured creditor. If, having waived its security, except to the extent necessary to show that Phillips had sustained no damages warranting a recovery by him in conversion, it seeks to sequester the assets of the defendant mercantile company for the benefit of itself and the general creditors. I can see nothing inequitable or inconsistent in allowing the plaintiffs the relief sought, so long as the defendants are given full credit for the value of the property already obtained by the John Miller Company, and so long as that company is properly charged with its receipt.

CHRISTIANSON, Ch. J. I concur in the foregoing opinion prepared by Mr. Justice Birdzell.

STATE OF NORTH DAKOTA, Respondent, v. HIRAM J. STEPP, Appellant.

(178 N. W. 951.)

Criminal law — district court may rule on motion for new trial after appeal from a conviction.

1. An appeal from a judgment and a motion for a new trial are independent remedies. A district court has jurisdiction to hear and determine a motion for a new trial in a criminal case made within the statutory time, although an appeal has been taken from the judgment of conviction.

District and prosecuting attorneys — statute permitting appointment of assistant counsel held not repealed.

2. Section 3381, Comp. Laws 1913, was not impliedly repealed by chap. 178, Session Laws 1901 (Comp. Laws 1913, § 3376).

District and prosecuting attorneys — assistant counsel should not be appointed except when necessary properly to represent state.

3. Pursuant to § 3381, Comp. Laws 1913, the district court may appoint, in its discretion, special counsel to assist the state's attorney in important

cases. This power or discretion, however, should not be exercised where it appears that the officials whose duty it is to prosecute can properly represent the interests of the state.

Criminal law — cross-examination and argument imputing improper relations between defendant and his present wife before their marriage held ground for new trial.

4. In a criminal prosecution for statutory rape, where the state, upon cross-examination of the defendant, and also, of his wife, has inquired concerning his relations with his present wife, some sixteen years ago, in Maryland and Virginia, anterior to their marriage, and while the defendant had a former wife, seeking thereby to impute to the defendant improper, if not illegal, relations; and where further, upon argument to the jury, the state, through a private prosecutor, made statements to the effect that the defendant left his first wife and children of tender years and went away with his present wife, before he secured a divorce from the former, it is *held* that such cross-examination, and such statements considered in connection with the findings thereupon by the trial court, constitute prejudicial error, for which a new trial must be granted.

Opinion filed June 16, 1920.

Criminal action for statutory rape in District Court, Cavalier County, *Kneeshaw, J.*

Defendant has appealed from a judgment of conviction and an order denying a new trial.

Reversed and new trial granted.

J. F. T. O'Connor, Sveinbjorn Johnson, Tudor Owen and Henry G. Owen, for appellant.

Under a law similar to chapter 17, Laws of 1901, the state of Wisconsin held that an unofficial member of the bar may not assist in the prosecution for a fee paid by private persons. *Beimel v. State*, 71 Wis. 444, 37 N. W. 244; *Bird v. State*, 77 Wis. 276, 45 N. W. 1126.

It is the policy of the criminal law that the prosecuting attorney have active superintendence of the management of criminal trials. He should see that the trial does not degenerate into a private prosecution or persecution. *People v. Blackwell*, 27 Cal. 66; *Hayner v. People*, 72 N. E. 792; *Com. v. Knapp*, 20 Am. Dec. 534; *Com. v. Webster*, 52 Am. Dec. 711.

Distinct crimes not connected with that on trial cannot be proved

against the accused to raise a presumption of guilt, on the ground that, being depraved enough to commit one crime, he may therefore be presumed to have committed the crime for which he is being tried. *Com. v. Ferrigan*, 44 Pa. 386; *People v. Sharp*, 107 N. Y. 427, 1 Am. St. Rep. 851, 14 N. E. 319, to the same effect.

Ferris v. People, 129 Ill. 521, 16 Am. St. Rep. 283, 4 L.R.A. 582, 21 N. E. 921.

Where, on the trial of a criminal case, counsel for the prosecution is permitted, in the presence of the jury, to state facts not in evidence, imputing a violent character to the accused, and to comment upon them in argument to his prejudice, he is entitled to a new trial. *State v. Comstock*, 20 Kan. 650; *State v. Tutten* (N. C.) 42 S. E. 443; *Bryson v. State*, 20 Tex. App. 566; *Jenkins v. State* (Fla.) 48 Am. St. Rep. 267; *Ship v. Com.* (Ky.) 10 L.R.A.(N.S.) 342, 90 S. W. 945.

G. Grimson, State's Attorney, *Wm. Langer*, Attorney General, *S. L. Nuchols*, Assistant Attorney General, and *Fred J. Traynor*, Special Assistant State's Attorney, for respondent.

On the question of the competency of evidence as to the birth of the child. 33 Cyc. 1476.

Evidence of other sexual offenses admissible. *State v. Rice* (N. D.) 168 N. W. 369; *State v. Bushbacker* (N. D.) 169 N. W. 82.

Extent of cross-examination of witness. *State v. Kent*, 5 N. D. 516; *State v. Malmberg*, 14 N. D. 523.

Error waived if no objection made at time evidence offered. *State v. Bushbacker* (N. D.) 169 N. W. 82.

BRONSON, J. Statement.—This is a criminal action for statutory rape. The defendant was found guilty by the jury on June 21, 1919. Three days later, the court sentenced the defendant for two years in the state penitentiary. On June 25, 1919, the defendant appealed therefrom. Later, the defendant made a motion for a new trial, which, on January 9, 1920, was denied. In a memorandum opinion, the trial court strongly intimated that prejudicial error occurred in the course of the trial, but, since the state had contended that the trial court had no jurisdiction to hear the motion for a new trial, although such court was of the opinion that it did, the court had decided to deny the mo-

tion for a new trial. From the order denying such new trial, and also from the sentence, the defendant, on April 1, 1920, appealed to this court.

The substantial facts necessary for the consideration of the specifications of error made by the defendant, are as follows: The information charges the defendant with committing, on February 26, 1917, statutory rape upon one Florence Day. The defendant was then fifty-one years old. He is a married man, having married his present wife in Maryland some sixteen years previous. There are no children as a result of this marriage, but he had children from a former marriage. The defendant had been engaged in operating a livery stable, trading horses and also traveling a stallion. Florence Day, at the time of the alleged crime, was fifteen years old. She is one of several children of Mr. and Mrs. Day, who lived in Sarles, North Dakota, and operated a farm near there. The defendant and his wife were neighbors of the Days. They visited back and forth as neighbors. At times the defendant did some work for the Days on their farm. In accordance with the testimony of the prosecutrix, the defendant in June and July, 1917, on two different occasions, had incomplete sexual intercourse with her. That in February, 1918, the defendant had complete sexual intercourse with her. All of these acts occurred on the kitchen floor in the home of the Days, at Sarles. On November, 1918, the prosecutrix gave birth to a full-grown baby girl. She also testified that she never had any sexual intercourse, either actual or attempted, with any other person excepting the hired man and a boy, Larry Stepp, who was a witness for the defendant. Concerning the incident with the hired man, she testified that on the Day's farm, in June, 1918, he started or made an attempt to have sexual intercourse with her, but no actual sexual intercourse took place. Concerning the act with the boy, the testimony is to the effect that one evening, in December, 1917, on the back porch of her home, an incomplete act of sexual intercourse took place.

On the other hand, Larry Stepp, the nephew of the defendant, testified that he was a schoolmate of the prosecutrix; that when he was sixteen years old he had complete sexual intercourse with the prosecutrix on two different occasions; that one of the acts occurred in the hayloft of a certain barn in Sarles, about the month of February, 1918, and the other act in the fall of 1918, after threshing time, in a

bed at her farm home. He denied having any act of intercourse with her on the back porch, as testified to by her.

On the part of the state the case was actively prosecuted by a private attorney appointed by order of the court, and designated so to serve without any cost to the county. During the course of the trial, the state, over the objection of the defendant, propounded questions to the defendant upon cross-examination, the effect and purport of which were to show that the defendant had indecently exposed his person and indecently solicited Mrs. Day, the mother of the prosecutrix, sometime in March, 1918, at the home of the defendant. The defendant denied such act, although he admitted that Mrs. Day, by reason of her frequently coming there, might have seen him partly undressed. Likewise, during the trial, the state propounded questions upon cross-examination, to the defendant, and also to his wife, who was a witness, which tended to elicit evidence and to show that years ago, in Maryland and Virginia, before the defendant was divorced from his former wife, he met and went with his present wife, first, in the home and town of his former wife, and, from there, later, to and in another town. That some of these acts occurred before he secured his divorce from his former wife. From the answers received to such questions, no improper sexual relations were shown between the defendant and his present wife.

During the course of the argument of the private counsel for the state before the jury, he made statements to the effect that the defendant had left his first wife and went away with his present wife; that he left his wife and children of tender years and went off into Maryland, taking with him this woman, who is now his present wife. That he left with his present wife before he was divorced from his first wife. That she was working at housework, while the defendant was working at blacksmithing, and that at least part of the time they lived in the same house where she worked, and he boarded and roomed there.

Contentions.—The state contends that the trial court had no jurisdiction to hear the motion for a new trial, for the reason that the defendant previously had deprived the court of such jurisdiction by appealing from the judgment of conviction to the supreme court.

The defendant has made twenty-five specifications of error. Those that seriously require the consideration of this court are the specifications which maintain that the trial court erred in appointing and per-

mitting a private attorney to prosecute this criminal action; that it was error at the trial to permit the introduction of evidence tending to show the commission of a subsequent offense by the defendant of indecent exposure of person and indecent solicitation, and that it was error to permit the introduction of evidence concerning the relations of the defendant with his present wife before their marriage. And further, particularly, that there was prejudicial misconduct of the private prosecutor for the state before the jury in making statements concerning such relations.

Opinion.—The defendant made a motion for a new trial within the statutory time allowed therefor. Section 10,902 Comp. Laws 1913, and before the time within which the right to appeal had expired. Comp. Laws 1913, § 10,994. This court has heretofore held that an appeal from a judgment and a motion for a new trial are independent remedies. *McCann v. Gilmore*, 42 N. D. 119, 172 N. W. 236. We are of the opinion that the trial court had jurisdiction to hear and determine the motion for a new trial as made.

Concerning the right of the private attorney to appear in behalf of the state in this case, the record discloses no objection made anterior to or during the trial on the part of the defendant. The record discloses that the state's attorney stated, in the record at the commencement of the trial, that the private attorney would appear as special counsel to assist in the prosecution. We are satisfied that pursuant to statute, § 3381, Comp. Laws 1913, the trial judge has a discretion in appointing special counsel to assist the state's attorney in important cases. That this discretion exists, although pursuant to § 3376, Comp. Laws 1913, the attorney general, his assistants, and the state's attorneys are denominated the only public prosecutors in all cases, civil and criminal, wherein the state is a party of the action. Laws 1901, chap. 178 (Comp. Laws 1913, § 3376), did not impliedly repeal said § 3381. We find no abuse of discretion in so designating, without objection, under the circumstances of this record, private counsel in behalf of the state. See *Fox v. Walley*, 13 N. D. 610, 102 N. W. 161.

This power or discretion, however, should not be exercised where it appears that the officials whose duty it is to prosecute can properly represent the interests of the state.

In respect to the questions propounded to the accused upon cross-

examination, concerning the indecent exposure of his person to the mother of the complaining witness, we are not prepared to hold that the trial court erred in permitting such cross-examination. In view of the direct testimony of the accused concerning his sexual desires and the proximity of the specific act upon which the question is propounded to the act of rape charged, such questions may be deemed proper for purposes of testing the credibility of the witness. Such questions, however, may become highly prejudicial to the defendant, and may serve to highly prejudice the jury by their mere suggestions to the defendant upon cross-examination, no matter how he may answer the same. See *State v. Nyhus*, 19 N. D. 326, 27 L.R.A.(N.S.) 487, 124 N. W. 71; *State v. Hazlet*, 16 N. D. 426, 438, 113 N. W. 374; *State v. Kent* (*State v. Pancoast*) 5 N. D. 516, 35 L.R.A. 518, 67 N. W. 1052; *State v. La Mont*, 23 S. D. 174, 120 N. W. 1104. See also *State v. Bushbacker*, 40 N. D. 495, 169 N. W. 82; note in 48 L.R.A. (N.S.) 238.

We are of the opinion, however, that there is error in the record, both with respect to the evidence solicited and adduced concerning the relations of the defendant, many years ago, with his present wife, and with respect to misconduct of the attorney in his comments upon such matter to the jury. The questions as propounded to the defendant in this respect had no bearing upon any issue involved in the case, and only remotely affected his credibility. They could highly serve the purpose of prejudicing the issues involved in the minds of the jury against the defendant. See *State v. Mackey*, 31 N. D. 200, 215, 153 N. W. 92. The statements made by the private counsel for the state in his argument to the jury may have seriously prejudiced the jury by reason of their conclusions that the defendant was guilty of highly reprehensible, if not of actual, criminal misconduct in such matter. This was entirely foreign to the issue involved in the case, and could serve only the purpose of arousing the prejudice of the jury, and of directing its attention from the real issue involved in the case. See *State v. Gunderson*, 26 N. D. 294, 144 N. W. 659, Ann. Cas. 1916A, 429; *State v. Nyhus*, supra. The trial court, in its memorandum opinion, has stated that "in a large measure the probability is that the jury was guided by passion and prejudice by reason of the admission of such evidence and statements of counsel." In view of such error

and the specific holding of the trial court thereupon, we are of the opinion that a new trial should be awarded. It is so ordered.

ROBINSON, J. (concurring specially). In the opinion as written by Mr. Justice Bronson, I do concur. This is a rape case. February 16, 1918, is the date of the alleged offense. The trial was in June, 1919. The transcript covers 274 pages, and a large part of it consists of irrelevant and prejudicial matter. The prosecution was represented by Mr. Grimson, state's attorney, Mr. Nuchols, assistant attorney general, and Mr. Fred Traynor, special counsel retained by the father.

Florence Day was between fifteen and sixteen years. She is the eldest of six children. From the age of seven she had gone to the village school at Sarles, yet, according to her story, she had not heard how children come into the world, and believed her good mother, who said the doctor brought them. Yet she is no simpleton. She was entirely competent to go into her father's field and to take charge of the plow and binder. Florence, as the special counsel familiarly calls her on most every page of the long transcript, was far from being malicious or a bad girl. She never told on her several lovers, never thought of blackmailing them; but, according to her own testimony, she was of rather easy virtue and entirely too familiar with her father's help and one or two young rascals. The result was she had a child and learned how children came into the world. Then, for the first time, she told mamma that defendant was the father. He was a married man of fifty-three years, and had some property. The young rascals had nothing, and so a special counsel was employed to aid in giving defendant a special prosecution.

There is no claim that by any word or act Miss Florence ever made the least resistance to any of her lovers. Her testimony is in some respects self-impeaching. Defendant swears positively that all she says of him is wholly untrue, and that he never took any liberties with her. Thus there is a direct conflict of testimony, and there is no corroboration on one side or the other. Hence, to turn the scales, the special counsel must have thought it necessary to drag in a lot of prejudicial matter. On the record no man can honestly say that the weight of evidence is against the defendant or that he is guilty beyond a reasonable doubt. Furthermore, though counsel has not made the

point, it is by no means certain the information states a public offense. Certainly it does not show a crime committed under subdivisions 2, 3, 4, 5, 6, or 7 of sec. 9563, Compiled Laws, and chap. 201, Laws 1915. Reversed.

JOSEPH ABDALCADER, Appellant, v. RICHARD KANAN, Anna Kanan, Respondents.

(178 N. W. 288.)

Appeal and error—supreme court on trial de novo may remand case for new trial.

1. In a trial *de novo* in the supreme court, where an action in equity to foreclose a real estate mortgage is made determinative upon the issue of payment and settlement of the debt, and where the record evidence upon such issue is made indefinite and uncertain by reason of newly discovered evidence offered upon motion for a new trial in the trial court, this court, although the trial court has denied the motion for a new trial, may remand, in the interest of substantial justice, the entire case to the district court for purposes of a new trial.

Opinion filed June 16, 1920.

Action in District Court, Billings County, *Crawford* and *Hanley*, JJ., to foreclose a mortgage.

Plaintiff has appealed from a judgment and order denying a new trial and has demanded a trial *de novo*.

Remanded for a new trial.

Simpson & Mackoff, for appellant.

T. F. Murtha, for respondents.

If the plaintiff was surprised he should have made an affidavit for continuance. 29 Cyc. 876; *Gaines v. White*, 1 S. D. 47, 47 N. W. 524.

"A new trial will not be granted except in unusual circumstances on the ground of newly discovered evidence which merely tends to discredit or impeach a witness or which is merely cumulative." 29 Cyc. 918, and note; *Axiom Min. Co. v. White*, 10 S. D. 198, 72 N. W. 462; *McGregor v. R. Co.* 31 N. D. 470; *State v. Croy*, 31 N. D. 67; *Jensen v. Clausen*, 34 N. D. 637.

A new trial will be granted on the ground of newly discovered evidence only when the latter is of such character as will probably change the result of the former trial. *Heyrock v. McKenzie*, 8 N. D. 601; *Braithwaite v. Aiken*, 2 N. D. 57.

BRONSON, J. *Statement*.—This is an action in equity to foreclose a real estate mortgage given to secure a promissory note. In September, 1919, after trial, the district court, upon findings, rendered judgment for the defendants upon the ground that there had been payment and settlement of the note. The plaintiff moved for a new trial upon the grounds of insufficiency of evidence, errors of law, and newly discovered evidence. The trial court denied the motion. The plaintiff has appealed from the judgment and the order denying such motion, and has requested a trial *de novo* in this court. The facts necessary to be stated are substantially as follows:

The plaintiff was a peddler. The defendants are husband and wife. The husband conducted a general store at Fryburg, North Dakota. They understand the English language rather imperfectly. Their correspondence is in Syrian. They sign their names in the Syrian language or Arabic language. In December, 1916, the defendants made a promissory note to the plaintiff for money borrowed, in the sum of \$706.69. To secure the same they executed a real estate mortgage upon certain lots in Fryburg, North Dakota. On February 18, 1918, this note was renewed with interest for \$765.22. In March, 1919, foreclosure of this mortgage by advertisement was instituted. This foreclosure was enjoined, and pursuant thereto this action in equity has resulted. In their original answer, made May 19, 1919, the defendants averred a general denial. This answer was amended on September 8, 1919, wherein it is alleged that Anna Kanan, the wife, never made a promissory note to the plaintiff; that the defendant, the husband, executed a note, but it is specifically denied that he delivered it; that he left such note with the agent of the plaintiff, with the understanding that it was not to be delivered until it was agreed to by his wife, and that, in some way unknown, the plaintiff got possession thereof. It alleged, further, that about the date of the second note the parties had a full settlement of all their affairs, and such notes were settled and paid in full. The trial was had on September 11, 1919.

The evidence offered on behalf of the defendants is to the effect that on February 25, 1918, a settlement was made between the parties; that then the plaintiff was paid \$250 in cash, received \$190 worth of merchandise and the balance amounting to some \$238, as they figured it was, upon accounts owing by the plaintiff to the defendants. That the plaintiff produced a note, tore it up and burned it in the stove. They introduced in evidence a receipt for \$700 in full payment of the note and mortgage. The signature thereto attached is in Syrian language, which the defendants claim to be the signature of the plaintiff. It is witnessed by another signature in the Syrian language stated to be that of Emil Kanan, and also by one Ernest Claflin, an American. They also offer in evidence a statement of the amount between the plaintiff and defendants showing \$250 cash paid, \$190 merchandise delivered, and other items for house furnished and livery bill paid for team of horses and trunk cases amounting to \$72, aggregating a total of \$512. The witnesses of the transaction concerning the settlement were the defendants, the daughter of the defendants, Emil Kanan, a relative, and Ernest Claflin. The defendant, the husband, testifies that this receipt was made February 25, 1918. Emil Kanan likewise so testifies. The daughter, fourteen years old, testifies that she wrote the receipt on February 25, 1918. Ernest Claflin, another witness, does not understand the Syrian language; he speaks English only; he testifies that he signed as witness to this receipt on Monday evening, February 25, 1918 (February 25th in 1918 occurred on Monday). He did not see the defendants give to the plaintiff any money, nor did he see any goods delivered, but he heard him say he was going to receive goods in payment, and they talked of settlement, and he saw him get a note, tear it in two, and put it into the stove. The wife testifies that she cannot write or read English, that she did not sign the note. The cashier of the First State Bank at Fryburg produced the signature of Anna Kanan, as made on the card records of the bank. Her name appeared thereon in English, and this cashier testified that she had seen her write and sign her name in English. One Sumara, a nephew of the plaintiff, was formerly in partnership with the defendant, Richard Kanan. On February 16, 1918, by written agreement this partnership was dissolved. By its terms, the defendant Kanan assumed the business and the obligations, with the right to collect the debts owing, except-

ing that the accounts owing by the plaintiff and one Mike Kanan were assigned and turned over to this nephew. He testified that the note and mortgage in question were signed by the defendants. That the plaintiff tore up the first note and put it in the stove. That the defendants signed the second note on February 18, 1918; that the wife can sign her name in both her own and in the English language. That the plaintiff, his uncle, never got any goods from this store after he dissolved partnership with the defendant Richard Kanan.

In the motion for a new trial upon the grounds of newly discovered evidence, the plaintiff presented an affidavit of one Pilot, to the effect that the defendant Richard Kanan approached Pilot, in the last part of April, or the first part of May, 1919, for the purpose of getting him to testify falsely that the plaintiff was a partner in his business at Fryburg, and that settlement was made at the termination of the partnership for the notes involved. That Richard Kanan admitted that he owed for the note. That he promised to pay Pilot well if he would so testify. He also produced the affidavit of one Fitzsimmons to the effect that, some three weeks after the dissolution of the partnership, he was in the store at Fryburg and overheard a conversation between the plaintiff and the defendant Richard Kanan concerning this indebtedness. That the defendant then refused to sign another note, but told the plaintiff that he would pay him every nickle. That Emil Kanan was not there at that time. He also produced the affidavit of one Kane in charge of records of the Northern Pacific Railway Company, to the effect that, in accordance with these records, Emil Kanan was in the employ of the railway company at Sunny, Morton county, in extra gang No. 6, from the 23d of February, 1918, to the 28th of February, 1918, inclusive, excepting Sunday, February 24th. Also, the affidavit of one Odeh was produced to the effect that he worked as a section hand in extra gang No. 6, and that from February 23d, to February 28th, inclusive, including Sunday the 24th, Emil Kanan was at Sunny, and worked on the week days mentioned. That he saw the check issued and the check received by Emil Kanan, the same being for \$12. In addition the affidavit of the plaintiff is produced to the effect that he was not informed concerning the new issues framed when the trial was had; that he was not prepared to meet the same; that he was taken by surprise on account of the testimony offered; that immediately after the

termination of the trial he proceeded to investigate concerning the settlement as testified in the evidence of the defendants. The affidavits of the other witnesses mentioned stated that they communicated the facts therein to the plaintiff after the trial.

As counter affidavits, the defendant Richard Kanan submits an affidavit to the effect that Pilot and Fitzsimmons were creditors of the defendant, and that he had trouble with them concerning the collection of debts owing. He denied generally the statement contained in such affidavits. Emil Kanan submits an affidavit to the effect that he told the attorney for the plaintiff concerning the matters upon which he testified, and that he was at Fryburg about the middle or latter part of February. An affidavit of the attorney for the defendant likewise was submitted, to the effect that he talked with the plaintiff's attorney before the trial, about information that he had received from Emil Kanan concerning a settlement that had been made.

Opinion.—This case is presented to this court for a review *de novo* upon the entire record. Manifestly the right of the defendants to prevail depends upon the issue of payment and settlement of the note and mortgage involved. In the evidence there is a sharp conflict upon this issue. The plaintiff claims that his signature to this receipt was a forgery. From the record it is difficult to determine the total amount that the defendants claim to have paid the plaintiff to effect such settlement. The statement of the account offered in evidence totals \$512, not \$700. The evidence otherwise offered covers \$190 merchandise furnished, \$250 cash paid and \$238, the aggregate of the other bills owing by the plaintiff, making a total of \$678. The note then amounted to about \$765. The burden was on the defendant to establish by proof the payment and the settlement made. Upon a review and retrial of the entire evidence as submitted at the trial, this court would hesitate to reverse the findings of the trial court. In view, however, of the strong showing of newly discovered evidence submitted by affidavits, which is not merely cumulative or impeaching in its character, but material upon the main issue involved herein, this court is unable to state or hold, upon this record, that the defendants have established sufficiently proof of the payment and settlement of the note and mortgage involved. In our opinion the plaintiff has sufficiently established grounds for a new trial upon the grounds of newly discovered evidence. See *Aylmer*

v. Adams, 30 N. D. 514, 153 N. W. 419; Keystone Grain Co. v. Johnson, 38 N. D. 562, 165 N. W. 977; State ex rel. Berndt v. Templeton, 21 N. D. 470, 130 N. W. 1009.

Through this newly discovered evidence, the testimony in the record is rendered sufficiently uncertain and indefinite to warrant this court, in the interest of substantial justice, to direct that a new trial be granted. Landis v. Knight, 23 N. D. 450, 137 N. W. 477. It is therefore ordered that the case be remanded to the trial court for a new trial, with costs to abide the event of such trial.

BIRDZELL, GRACE and ROBINSON, JJ., concur.

CHRISTIANSON, Ch. J. (concurring). This case was tried before Judge W. C. Crawford. Judgment was rendered in September, 1919. Judge Crawford being absent, the motion for a new trial was made before Judge J. M. Hanley in March, 1920. The statement of the case was not settled until about April 26, 1920. In the circumstances Judge Hanley was in no better—nor as good—position as the members of this court, to pass upon the question whether a new trial should be granted. He had before him nothing but the lifeless affidavits; and he did not have the benefit of the settled statement and extended briefs and argument with which the members of this court have been favored. Hence the well-known rule that “the granting or refusal of a new trial on the ground of newly discovered evidence rests in the sound, judicial discretion of the trial court” has little or no application. The basic reason for the rule is absent. See Braithwaite v. Aiken, 2 N. D. 57, 63, 49 N. W. 419. If the motion for a new trial had been made before and determined by the judge who tried the suit, I should not feel disposed to disturb either the judgment or the order denying a new trial. But in view of all the circumstances, I believe that the ends of justice will be best subserved by remanding the case for a new trial. I therefore concur in the opinion prepared by Mr. Justice Bronson.

45 N. D.—34.

CORA KING, formerly Cora Schwer, Appellant, v. CARL E. TALL-
MADGE et al., Respondents.

(178 N. W. 280.)

Appeal and error—supreme court not required to render final judgment when justice demands new trial.

1. The supreme court is not required to render final judgment in all cases wherein a trial *de novo* is demanded. Where it deems such course necessary to the accomplishment of justice, it will remand the case for a retrial in the district court.

Appeal and error—where necessary for the accomplishment of justice, cause will be remanded.

2. For reasons stated in the opinion, the instant case is remanded for a new trial in the district court.

Opinion filed July 18, 1920.

From a judgment of the District Court of Billings County, *Crawford, J.*, plaintiff appeals.

Remanded for a new trial.

Simpson & Mackoff and *S. Pomerance*, for appellant.

"It is a general rule, to which there are certain exceptions, that a person may not be the agent for both the contracting parties at the same time." 2 C. J. 448, 712, §§ 47 c, 367 j.

"An agent can never have authority, either actual or ostensible, to do an act which is and is known or suspected by the person with whom he deals to be a fraud upon the principal." N. D. Comp. Laws, § 6327.

Thos. H. Pugh and *Otto Thress*, for respondents.

"Agency will not be presumed, and where its existence is denied the burden of proof is upon him who asserts its existence." *Martinson v. Kershner*, 32 N. D. 46, 155 N. W. 37.

"When the agency is to be inferred from the conduct of the principal, that conduct furnishes the only evidence of its extent, as well as of its existence. When the belief of the authority of an agent arises only from previous actions on his part as an agent, the persons treating with him must, on their own responsibility, ascertain the nature and extent of his previous employment." 2 C. J. 560, 561, §§ 202-204.

A deed cannot be delivered to the grantee as an escrow. *Sargent v. Cooley*, 12 N. D. 7, 94 N. W. 576; *Ueland v. More Bros.* 22 N. D. 283, 133 N. W. 543; *Comp. Laws* 1913, § 5497.

When one of two innocent persons must suffer by the actions of a third, he by whose negligence it happened must be the sufferer. *Comp. Laws*, § 7277; *Bank v. Elevator*, 35 N. D. 619, 161 N. W. 287; *Stoffels v. Brown*, 37 N. D. 272, 163 N. W. 834.

The evidence sufficient to set aside a deed must be clear, specific, satisfactory, and convincing. *Jasper v. Hagen*, 4 N. D. 1, 23 L.R.A. 58, 58 N. W. 454; *McGuin v. Lee*, 10 N. D. 160, 86 N. W. 714; *Miller v. Smith*, 20 N. D. 100, 126 N. W. 499; *Weist v. Bank*, 32 N. D. 187, 155 N. W. 17; L.R.A.1916B, 192. et seq. where the cases are collated.

CHRISTIANSON, Ch. J. The plaintiff brought this action to rescind a certain transaction whereby she agreed to convey to the defendant Tallmadge certain lands in Billings county in exchange for a residence located in Cooperstown in this state. The transaction was negotiated through one Grassinger. One of the controverted questions is whether Grassinger was Tallmadge's representative, or whether he acted for the plaintiff. The plaintiff claims that she was induced to make the deal through false and fraudulent representations. During the course of the trial she testified to certain representations in addition to those set forth in the complaint; and upon motion of her attorney she was permitted to serve and file an answer to conform to the proofs. The trial court, in a memorandum opinion, intimated that he was of the opinion that plaintiff had been defrauded, but that, on account of her failure to preserve the property she received from the defendant in exchange, a rescission could not be had. The findings of fact are, however, in favor of the defendant upon all material points.

A careful consideration of the evidence leaves us very much in doubt as to what disposition should be made of the case. Upon many features the evidence is quite unsatisfactory as viewed from the standpoint both of the plaintiff and of the defendant. It also seems clear that both parties are or will be in position to adduce additional evidence which will clarify the situation. Upon the record presented, we do not feel justified in reversing the judgment, nor do we feel justified in affirming

it. We believe rather that the case is one where the interests of justice will be best subserved by remanding the case for a retrial in accordance with the precedents set by *Landis v. Knight*, 23 N. D. 450, 137 N. W. 477; *Williams County State Bank v. Gallagher*, 35 N. D. 24, 159 N. W. 80; *Sutherland v. Noggle*, 35 N. D. 538, 160 N. W. 1000.

It is therefore ordered that the case be remanded for a retrial. All costs, including the costs of this appeal, will abide the result of the final judgment.

BROTHERHOOD OF AMERICAN YEOMEN, a Corporation, Respondent, v. FARMERS' EQUITY STATE BANK OF MANDAN, North Dakota, a Corporation, Appellant.

(178 N. W. 285.)

Insurance—principal cannot disaffirm agent's authority and still retain benefit of his acts.

1. Where a principal admits the agency of one who executes a promissory demand note, and signs his and the principal name thereon, and in such a way that the relation of principal and agent appears upon the face of the note, the note being given to a bank for a loan, and the money is advanced thereon and paid over, by the agent, to the principal, and the principal thereafter denies the authority of the agent to thus execute the note, such principal is in no position to claim the right to retain the money it received upon the note, while denying liability thereon. It cannot disaffirm the authority of the agent to make the contract, and at the same time retain the benefit thereof of his unauthorized act.

Banks and banking—bank held to have authority to charge note against depositor's account.

2. Where an agent borrowed money upon a promissory demand note from

NOTE.—As to what constitutes an implied ratification of an unauthorized loan effected by an agent, see notes in 6 L.R.A.(N.S.) 311, and 52 L.R.A.(N.S.) 571.

As to whether mere acceptance of the benefits by the principal is a ratification of the agent's unauthorized use of a third person's money for purposes beneficial to principal, see note in 15 L.R.A.(N.S.) 693.

On effect of ratification by principal of agent's unauthorized contracts, see note in 5 Am. St. Rep. 109.

a bank, and signed the same in the manner above stated, and the principal denies authority of the agent to sign the note, but receives and retains the benefit and proceeds of the loan for which such note is given, and where the principal subsequently has a deposit in the same bank, the bank may charge the note to that account.

Opinion filed June 7, 1920. Rehearing denied June 19, 1920.

Appeal from an order and judgment of the District Court of Morton County, Honorable *J. M. Hanley*, Judge.

Reversed and remanded.

Nichols & Kelsch, for appellant.

Whoever deals with a corporation by its purported agent does so at his peril as to the existence of the relation of principal and agent between the corporation and the purported agent. *Grant County State Bank v. Northwestern Land Co.* 28 N. D. 479.

It is also true as a general proposition that even if a corporation borrowing money has no implied power to do so, it must repay money actually received by it and used for its benefit. 7 R. C. L. § 587; *Grant County State Bank v. Northwestern Land Co.* 28 N. D. 510.

Ostensible authority or apparent authority is inferred from signature of said notes in such representative capacity. *Swedish American Bank v. Koebernick*, 117 N. W. 1020.

Where corporate officers or agents, without authority, borrow money for the corporation, and the money is received and used for the benefit of the corporation, the corporation ratifies the contract under which the money is paid. Corporations, 7 R. C. L. § 667; *Grant County State Bank v. Northwestern Land Co.* 28 N. D. 507.

L. H. Connolly, for respondent.

The person who deals with the agent does so at his peril. He is bound to know that the person with whom he deals is the agent of the person whom he claims to represent, and he is also bound to know the extent of the agent's authority. *Corey v. Hunter*, 10 N. D. 5; *Stock Exch. Bank v. Williamson (Okla.)* 50 Pac. 93; *Martinson v. Kershner*, 32 N. D. 46.

In order to show a ratification by a principal of the unauthorized act or contract of an agent by the acceptance and enjoyment of the benefits, it must appear that the principal had knowledge of the material

facts, or that he intentionally accepted the benefits without inquiry. *Jewell Nursery Co. v. State* (S. D.) 59 N. W. 1025; *Smith v. Lynch* (Cal.) 43 Pac. 670; *St. John & Marsh v. Cornwall* (Kan.) 35 Pac. 78; *Schull v. New Budsell* (S. D.) 86 N. W. 64; *Jackson v. Badger* (Minn.) 26 N. W. 908; *Stout v. McLaughlin* (Kan.) 15 Pac. 902.

GRACE, J. This action is one by plaintiff to recover the sum of \$326.23, which he claimed to have on deposit in defendant's bank. The defendant refused to honor plaintiff's check in that sum.

The case was tried to a jury, and, at the close of the case, each party moved for a directed verdict, after which the court discharged the jury and made findings of fact and conclusions of law, adjudging and determining that plaintiff recover judgment in the sum of \$360.99, and judgment was accordingly entered for this sum. A motion to vacate and set aside the judgment and for a new trial was denied.

The facts are not in dispute. Plaintiff is a foreign corporation, with its principal office in the city of Des Moines, Iowa. A local lodge or chapter was organized in the city of Mandan, of which one August Usselman was duly elected and acting as its correspondent or secretary, from the 11th day of August, 1917, until the 18th day of September, 1918.

The plaintiff carried an account in its corporate name in defendant bank. The correspondent had sole and exclusive charge and custody of the financial affairs of the local chapter during all the time he served in that capacity.

On August 11, 1917, he purchased a draft, payable to the plaintiff, for \$273.30, and in payment thereof gave his note, payable to the defendant, for \$185.70, and paid \$87.60 in cash, which was signed, The Brotherhood of American Yeomen, by August Usselman, Secretary.

On August 24th, Usselman paid \$118.10 on the note, leaving a balance of \$67.60, which he paid on September 14, 1917.

On September 14th, he purchased a second draft, payable to the defendant, in the sum of \$266.55, and gave a demand note, payable to the defendant bank, and signed it in the same manner as he had signed the previous note.

On October 5, 1917, he paid on this note \$197.50, and on October 18th, paid the balance. On the 18th day of October, he purchased a

third draft, payable to plaintiff, in the sum of \$322.86, and for this he paid \$35 in cash, and gave a demand note, payable to the defendant, signed in the same manner as the notes above mentioned. He paid this note October 18th, and purchased a fourth draft, in the sum of \$313.65, paying for it \$31.48 in cash, and gave a promissory note for \$282.17, signed in the same manner as the former notes.

He paid this note on December 10th and purchased a fifth draft for \$328.60, payable to plaintiff, and paid for this \$26.28 in cash, and gave his note for \$332.32. On this note, he paid \$14.13 on December 10th, leaving a balance of \$288.19 still due on the note.

During the months of January, February, March, and May, the secretary purchased other drafts from the defendant, which he paid for in cash and with checks.

On July 6, 1918, the secretary renewed the promissory note dated December 10th. The amount of the new note, given in place of the old note and interest, amounted to \$305.23.

In the fall of 1918, August Usselman died. Defendant presented its demand renewal note to the officers of the local chapter for payment, and payment was refused.

On the 10th day of July, 1919, the defendant bank applied the sum of \$326.23, which the plaintiff had in the bank in the form of a general deposit, in payment of the principal and interest then due upon the said demand note, and gave notice of its action to the local office of the plaintiff, and surrendered the note, indorsed and fully paid.

On July 11, 1919, one Helbling, an officer of the local chapter, in his official capacity, signed and presented to the defendant bank a check, in the sum of \$326.23, payment of which was refused on the claim that at that time plaintiff had no funds in the bank, and at the same time gave notice that the general deposit in question had been applied in payment of the principal and interest due upon the note in suit.

It is admitted that Usselman was the agent of plaintiff; that he acted as such during all the time when the various remittances above mentioned were made to the plaintiff. He had actual authority to collect from the membership of the homestead (the local lodge) the money, in the way of assessments, etc., which the members were required to pay at various times, in accord with the rules, regulations, and constitu-

tion of the plaintiff; and it was his duty, when collection thereof was made, to remit the same to the plaintiff at Des Moines.

It does not appear that he had any actual authority from plaintiff to borrow money nor execute the notes which were executed, and if he had executed note or notes to the bank or any other person, without the knowledge or consent of the plaintiff, and had received the money thereon, and converted it to his own use or otherwise disposed of it, and paid no part of it to the plaintiff, we think, in such case, the plaintiff would be under no liability on such note, and could not be bound by the acts of its agent, thus acting entirely without authority.

In this case, however, while it may be true the agent was acting outside of his authority in executing the note in question and receiving the money thereon, it also appears, and it is true, that plaintiff received all the money from its agent which he procured on the note.

The plaintiff cannot in one breath say the agent had no authority to execute and deliver the note, and in the next say that, notwithstanding he had no such authority, it is entitled to the proceeds or fruit of his unauthorized act.

We think what we have said is decisive of this case. The question of the ostensible authority of Usselman to execute the note in question has been raised. We do not think this is a material issue herein, nor is a decision on that question necessary to a decision of the case. In fact, in view of what we have said, we think whether Usselman had or had not ostensible authority is immaterial, and that subject needs no further consideration.

We think the laws, rules, and constitution of the plaintiff are no notice to the defendant, in the absence of proof that it had knowledge or notice thereof.

Assuming that they are usually binding on a member of the lodge or organization, even if it should appear such member had no actual knowledge thereof, and this, on the theory that, being a member, he is presumed to have knowledge of its laws, rules, and constitution, etc., it does not follow that they are notice to a stranger to the organization or lodge.

We are satisfied the court was in error in concluding, as a matter of law, that defendant was indebted to plaintiff in the sum of \$326.25, or any other sum; and further was in error in holding that the allega-

tions of the complaint are true. Most, if not all, of the errors assigned are well taken.

We are of the opinion the order and judgment appealed from should be reversed. They are reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

The appellant is entitled to his costs and disbursements on appeal.

BIRDZELL, ROBINSON, and BRONSON, JJ., concur.

CHRISTIANSON, Ch. J. (dissenting). I am constrained to dissent from the foregoing opinion.

The plaintiff is a fraternal benefit society, having a lodge system with a ritualistic form of work and a representative form of government. It is incorporated under the laws of the state of Iowa, and its head office is in the city of Des Moines. It has a supreme governing or legislative body known as the Supreme Conclave, and subordinate lodges or branches. Each state constitutes a grand jurisdiction known as a State Conclave. The local lodges are called Homesteads. The State Conclave is made up of representatives from the different Homesteads. The State Conclave meets annually. At such meeting it is required to levy the necessary assessment upon the members in the state to maintain in force the benefit certificates issued to such members. The constitution provides that such "assessment shall be collected by the state correspondent through the Homesteads in that state." It further provides: "A Homestead correspondent shall transmit the per capita tax provided for the maintenance of the State Conclave to the state correspondent, without a vote thereon. If any Homestead correspondent fails to transmit such funds to the state correspondent, said Homestead may be suspended by the grand foremen when receiving notice thereof from the state correspondent, and such Homestead shall remain suspended until the assessments are paid."

A local lodge or Homestead had been established at Mandan. In July, 1918, and for sometime prior thereto, one August Usselman was the correspondent of the Mandan Homestead. It is true, as stated in the majority opinion, that Usselman, from time to time, borrowed money

from the defendant bank upon promissory notes, to which he signed the name of the plaintiff by himself as secretary; but there is not a scintilla of evidence tending to show that he had any authority to do so. Nor is there any evidence—nor for that matter any contentions—that the plaintiff had any notice or knowledge that such loans were being made. The positive testimony is, also, that the local homestead never authorized Usselman to make such loans. One of the officers of the local lodge testified that Usselman was found to be short in his accounts, and the only reasonable inference to be drawn from the evidence is that he misappropriated the moneys collected from the local members, and that the money he borrowed from the defendant bank from time to time was used to make up his shortages.

The majority members hold that the plaintiff is liable on the ground that it received the benefits of the notes executed by Usselman in its name. I do not believe that this principle is applicable here, nor am I aware of any principle upon which the plaintiff can be held liable on the notes executed by Usselman. "It is fundamental in the law of agency that the power of every agent to bind his principal rests upon the authority conferred upon him by that principal, and this authority as to third persons consists of the powers intentionally conferred, those incidental to or implied from the main powers conferred, those which custom and usage have added to the main powers, and those which the principal has caused, as by a previous course of dealing, persons dealing with the agent to believe that the principal has conferred, as well as power, the exercise of which by the agent the principal is by his conduct estopped to deny, or which he has subsequently approved and ratified. Without this authority for which the principal himself, by acts or conduct, has become responsible, the agent can bind only himself." 2 C. J. 560. See also Comp. Laws 1913, §§ 6325-6343, 6352; *Martinson v. Kershner*, 32 N. D. 46, 155 N. W. 37.

The defendant must have known that a fraternal benefit society, organized and doing business as the plaintiff, does not authorize officers of the local lodge to borrow money or execute promissory notes in its behalf. If the local officers had such authority it would indeed be difficult, if not impossible, for the society to make the reports which it is required to make to the insurance departments of the different states. In fact it is quite apparent that the defendant did not believe

that the note was a valid obligation against the plaintiff. The cashier admitted that payment was never demanded from the plaintiff. He also stated that the defendant had caused the note to be presented as a claim against the estate of August Usselman.

This is not a case where an agent has borrowed money and expended it in discharging obligations against his principal. In such case the principal receives the benefit, and his liabilities are not enlarged. In this case the plaintiff had assumed certain liability as an insurer. The liability was evidenced by certain benefit certificates issued to members of the Mandan Homestead. Its liability as an insurer was conditioned upon payment to it, by those insured, of certain premiums or assessments. For the moneys which the plaintiff received from Usselman it continued the benefit certificates in force,—i. e., it in fact assumed a liability equal to the amount of moneys received. Whatever benefits were received were received by Usselman and by the persons whose benefit certificates were kept in force. The plaintiff received no benefit. Its total assets were not increased, because, although it received the money which Usselman borrowed from the defendant bank, by virtue of such payments into its treasury, its liabilities were increased in a corresponding amount. Hence, if the plaintiff is required to pay the note in suit its liabilities will be increased in precisely the amount of the judgment, and for this liability it will receive no corresponding benefit. If similar liabilities have been incurred in other subordinate lodges, and plaintiff required to pay them, its assets—funds held in trust for the beneficiaries will be greatly impaired. In the circumstances shown to exist in this case, I do not believe that the principle invoked by the majority members has any application. See *Calhoun v. McCrory Piano & Realty Co.* 52 L.R.A.(N.S.) 571, and extended note thereto.

CARL CARLSON, Respondent, v. S. M. DAVIS, Appellant.

(178 N. W. 445.)

Landlord and tenant—evidence insufficient to sustain verdict for share of wheat under farm lease.

1. The plaintiff, lessee in a farm lease, claimed that the number of bushels of wheat threshed were 8,366 bushels, machine measure. The lessor claimed, in all, there were 5,824 bushels and 24 lbs. of wheat, elevator weights.

The lessee was not in default in any manner in the performance of the covenants of the lease. The lease contained no covenant reserving the right of the lessor to deduct for any advances made the lessee, during the time of the lease.

Under a chattel mortgage the lessor, the defendant, took possession of all the wheat at the time of threshing thereof, and thereafter exercised complete and exclusive dominion over it. He hauled it to the elevator, deposited it all in his name, and sold it.

The lessee brought an action for the value of one half of 8,366 bushels of wheat, and by the jury was given a verdict for the value thereof, less certain debts and obligations owing by him to the lessor, to the allowance of which the lessee made no objection.

Held, that the verdict as to the amount of wheat threshed is not supported by substantial evidence.

Landlord and tenant—evidence sustaining finding of no settlement of claims under farm lease.

2. The defendant interposed, as a defense, a claim of prior settlement between plaintiff and defendant, of all matters in dispute. Whether such a settlement was made was a question of fact for the jury. The evidence thereof was in conflict. The jury returned a verdict in plaintiff's favor, and thus decided there was no settlement.

Judgment—no res adjudicata where plaintiff was merely witness in former action.

3. The defendant interposed a plea of *res judicata*. *Held*, for the reasons stated in the opinion, that such principle, under the facts in this case, has no application.

Opinion filed June 19, 1920.

Appeal from order and judgment of the District Court of Hettinger County, Honorable *F. T. Lembke*, Judge.

Reversed and remanded.

Harvey J. Miller, for appellant.

"Where a farm is rented for a share of the crops, the landlord and tenant are tenants in common of the crops raised by the tenant." *Mpls. Iron Store Co. v. Branum*, 36 N. D. 355, 162 N. W. 543; *Rohrer v. Babcock*, 126 Cal. 222; *McNeal v. Rider*, 79 Minn. 153; *Riddle v. Dow*, 98 Iowa, 7; *Wilber v. Sisson*, 53 Barb. 258.

Accounting would be the proper remedy, and in such an action defendant could be held only for what he actually received, and the burden of proof would be upon the plaintiff. *Accounts & Accounting*, 1 Cyc. 405, f; *Johnson v. Johnson* (N. D.) 164 N. W. 327.

Thomas H. Pugh, and *Otto Thress*, for respondent.

Where chattels are delivered to a bailee, in good condition, and are not returned or accounted for, the law presumes negligence to be the cause of the failure to return, and casts upon the bailee the burden of showing that the loss is due to other causes, consistent with due care on his part. *Marshall v. Gage*, 8 N. D. 364, 79 N. W. 851; *Clafin v. Meyer*, 75 N. Y. 260, 31 Am. Rep. 467; *Lebens v. Wolf* (Minn.) 165 N. W. 276; *Stone v. Case* (Okla.) 43 L.R.A.(N.S.) 1168 and note, 124 Pac. 960; *Butt v. Davidson* (Colo.) 44 L.R.A.(N.S.) 1170, 131 Pac. 390; *Hildebrand v. Carroll*, 106 Wis. 324, 83 N. W. 145; *Russell v. Union Mach. & Supply Co.* (Wash.) 153 Pac. 341.

It would generally be impossible for the bailor to show that the property had been lost or destroyed, while the bailee, being in actual possession, should always be able to account for the subject of the bailment, and his failure to do so raises a presumption of negligence against him, which he can remove only by clear proof of the loss or destruction of the goods. 6 C. J. 1158, § 160.

The verdict having substantial testimony to support it, and being approved by the lower court, the ruling of the lower court will not generally be disturbed on appeal. *Hager v. Clark*, 35 N. D. 591, 161 N. W. 280; *Blackorby v. Ginther*, 34 N. D. 248, 158 N. W. 354; *Walker v. Laubscher* (Iowa) 162 N. W. 780; *Tarczek v. C. & M. R. Co.* (Wis.) 156 N. W. 473; *Branthover v. Monarch El. Co.* (N. D.) 173 N. W. 455.

To constitute a good defense by way of former adjudication, it is necessary that there be an identity of the thing sued for, identity of the cause of action, identity of persons to the action, and identity of

he quality in the persons for or against whom the claim is made. The following authorities are in point: *Rahr v. Wittman* (Wis.) 132 N. W. 1107; *Kammann v. Barton*, 23 S. D. 442, 122 N. W. 416; *Goldberg v. Sisseton, L. & T. Co.* (S. D.) 123 N. W. 265; *Black*, *Judgm.* § 531; 23 *Cyc.* 1237; 10 *R. C. L.* pp. 1116, 1117, § 323; *Union Nat. Bank v. Western Bldg. Co.* (N. D.) 175 N. W. 628; *Luick v. Arends*, 21 N. D. 624, 132 N. W. 353.

Every person is a privy to a judgment or decree who has succeeded to an estate or interest held by one who was a party to the judgment or decree. If the succession occurred after the bringing of the action, and privity to the judgment in such case implies a relationship by succession or representation between the party to the second action and the party to the prior action in respect to the right adjudicated in the first action. *Smith v. Kessler*, 127 *Pac.* 172; 23 *Cyc.* 1253; 24 *Am. & Eng. Enc. Law*, 746; *Stamp v. Franklin*, 144 N. Y. 607, 39 N. W. 634; *Bigelow, Estoppel*, 142 *et seq.*; *Coleman v. Bosworth* (Iowa), 164 N. W. 238.

GRACE, J. The plaintiff, by a written lease, leased from the defendant, for the year 1915, the east half of section 5, township 135, range 97.

Most of the land had been summer fallowed. Each was to furnish one half the seed and to receive one half the crop, and plaintiff to pay all the threshing-machine bill, and deliver, free, the share of the defendant to an elevator in New England.

The plaintiff claims to have raised upon the premises in 1915 8,366 bushels of wheat, and that his share of that was 4,183 bushels, of the value of \$3,596.98, and brings this action to recover that amount.

The defendant claims there were raised upon the premises only 5,824 bushels and 24 lbs., which were sold for \$5,017.55, of which he claims he was entitled to one half for rental, and that, from the remainder, he deducted certain items, aggregating \$1,487.21, and in addition, a note for \$992.35, secured by a chattel mortgage on plaintiff's share of the crop.

The lease contains no stipulation reserving to defendant a lien on plaintiff's share of the crop, for advances made by the defendant, during the term of the lease; and, in the absence of such a reservation, the

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defendant had no lien thereon, unless, perhaps, for that part of the seed grain which plaintiff was to furnish, which the lease stipulates shall be taken out of the proceeds of the crop, which means out of plaintiff's share.

In the case of the Minneapolis Iron Store Co. v. Branum, 36 N. D. 355, L.R.A.1917E, 298, 162 N. W. 543, this court construed a clause similar to that in this lease, reserving title and possession of all crops with the landlord, until a division of the same.

We there held such a reservation was in the nature of a chattel mortgage, to secure the advances, if any, of the landlord to the tenant. Unless there is a provision in a lease providing for advances, and unless advances under the terms thereof are, in fact, made, by the lessor, a provision in a lease, retaining title and possession of all crops in the lessor until division, does not operate to effect a lien on the lessee's share thereof, but when there is a provision for advances, and the lessor makes such advances, a provision retaining title and possession of all crops until division is of the nature of a chattel mortgage lien on the lessee's share, and such lessor has no greater or different rights thereunder than a mortgagee's under a chattel mortgage.

Where there is a provision for advances, and advances have been made, and where there is a clause retaining title and possession of all crops in the lessor until division, the tenant, nevertheless, has the right to have the crops divided upon the farm, unless some other place for division is specified, and he has title to his share and possession thereof, subject to the right of the lessor's lien for advances, in the nature of a chattel mortgage.

In this case, the plaintiff owed a note to the defendant for \$992.35, which was secured by a chattel mortgage on plaintiff's share of the crop.

The defendant could not claim that amount as an advance, though there was a condition in the lease providing for a lien for advances, but in such case, in order to realize upon such chattel mortgage, he would be required to take the regular steps provided by law; for it is an entirely different instrument and obligation than the lease, and bears no relation to it, and is not connected with it.

The relation between plaintiff and defendant, under the lease, was that of landlord and tenant. The possession of the land was in the

tenant, and he had an estate therein for the time of the lease. *Minneapolis Iron Store Co. v. Branum*, supra.

The tenant had an undivided one-half interest in all the crops raised upon the land, during the time of the lease; and, under the terms of the lease, he was entitled, when the crops were harvested and threshed, to have the crops divided and to receive his one half thereof.

The respective rights of landlord and tenant are quite fully analyzed and settled in the case of *Minneapolis Iron Store Co. v. Branum*, and we adhere to the principles set forth therein. We think the evidence conclusively shows that defendant, under the chattel mortgage, did take possession of all the crop in question, after the same was threshed, and thereafter maintained full dominion over it, and hauled it or caused it all to be hauled to the elevator, and all deposited in his name. It was all sold by him. He never at any time made any division of the crop with the tenant; and this, in direct violation of the terms of the lease, thus acting in a high-handed and unwarranted manner and without authority.

At the time he took possession of the crop, he was not entitled to it, but was entitled to only one half thereof, after the division.

The evidence does not show that there was any default in the chattel mortgage, nor that he had a right to take possession of the crop under it.

The most favorable light that defendant can be placed in is that, though having wrongfully taken possession of all the crop, in a suit by plaintiff against him, for the value of plaintiff's share, he may be permitted, as a set-off or counterclaim, to deduct the debts of plaintiff secured by chattel mortgage, or deduct any debt which is in any way secured by a valid lien upon plaintiff's share of the crops.

The total of these debts was \$2,479.56. That amount included one item of \$145, for the cost of additional seed grain. Part of the seed first purchased having disappeared, and this amount was to replace that.

The defendant insisted on charging the whole amount of that item to the plaintiff, whereas only one half of it should have been charged to him.

The defendant, however, did finally charge himself \$50 of the amount, and that, deducted from \$2,479.56, leaves \$2,429.56, which

are all the claims and interest which the defendant had against plaintiff. The plaintiff makes no objection to the allowance of this amount.

Before taking up for consideration the number of bushels of the crop, we will dispose, at this point, of one of the errors assigned by defendant, wherein he claims the trial court erred in not admitting in evidence, at this trial, certain exhibits offered in the trial of another lawsuit between wholly different parties, and relating to an entirely different subject-matter.

The trial just mentioned was the case of New England Invest. Co. v. Davis. This plaintiff was not a party to that action. He had no control over it, nor had he any right to, in any manner, direct it. He was not represented at that trial by an attorney, nor at all. He had no right to offer the testimony of witnesses, nor to say what testimony should be adduced, nor right to interpose objection to testimony offered; nor had he the right of cross-examination of witnesses. He had no right to appeal from the judgment, and no control whatever over it. He was merely a witness in that case, nothing more.

In such circumstances, it matters not what the result of that trial was, nor what the evidence there introduced, nor what the contents of the verdict or judgment. None of it is binding upon the plaintiff in this case, and hence the plea of *res judicata* has no application, and the court properly excluded all the exhibits of that trial which were sought to be introduced at this. The plaintiff is in no manner estopped by any of the proceedings or events which occurred in that trial, nor by the result thereof. 10 R. C. L. 1116; 23 Cyc. 1237.

It is clear there was no error in excluding, as evidence, such exhibits, nor the offer of proof thereof. There was no error committed by the trial court, in the instruction, the giving of which is assigned as error.

We have remaining only the question of sufficiency of the evidence to sustain the verdict. We have no hesitancy in saying that there is not substantial evidence to sustain the verdict.

There is substantial testimony to show that the defendant, under his mortgage, took possession of all the crop; that he hired Mr. Johnson to do the threshing; that he hired teams to haul the grain to town (the plaintiff hauling a few loads, thus trying to save the expense); that he directed to what place the grain should be hauled, and in what eleva-

tor it should be delivered; that he had all the grain hauled placed in his own name, and that he sold it all, and received all the proceeds.

The evidence not only shows that plaintiff took possession of all the grain, but further shows he thereafter exercised complete dominion over it.

He thus became liable to plaintiff for one half of the value of all the grain, for plaintiff was entitled to have the crops divided, and receive one half thereof, upon the farm.

It was the defendant's obligation, under the contract, to divide the grain and give plaintiff his one half of all the crops, if he had performed the covenants of the lease, on his part, and there is no evidence to show that he had not; in fact, the evidence shows that he had.

It is true the contract does not show that the division of the grain shall be made upon the farm, and plaintiff's share there delivered to him, but, in the absence of a stipulation in the lease, providing that the division shall be made elsewhere, where it does contain a provision for division, the only reasonable construction to give to such a provision is that it means the division should be made upon the farm, where the grain was raised; that was clearly the intent of the covenant in this lease, providing for a division of the crops.

We think, therefore, the defendant is liable, under his contract, to plaintiff, for plaintiff's share of the grain; and conceding that the defendant had the right to deduct the debts owing from plaintiff to him, from the value of plaintiff's share, and to this the plaintiff does not object, it is clear whatever balance is left, plaintiff should recover.

This brings us to the question of the actual amount of wheat raised upon the land and threshed, and as to this there is a discrepancy between the claims of plaintiff and defendant, to the amount of approximately 2,542 bushels. The amount each claimed was actually threshed is above set forth.

There is evidence that, when the thresher went on the land to thresh the wheat, he set the weights of the arrangement for the measuring of the grain so as to give a full half bushel; that plaintiff and the defendant therein held a basket, while the thresher set the weight, and Davis said it was all right; and that this was done several times during the threshing, and tab was kept on the matter all the way through the threshing.

The meaning of the testimony in this regard, and the only reasonable inference to be drawn therefrom, is that the apparatus for measuring the grain was so regulated that when sufficient wheat in weight accumulated therein, it would trip or dump such wheat, which would pass down a conveyer, and was sufficient in amount to fill a half-bushel measure.

The grade of the wheat being No. 1, there should be approximately as many bushels, elevator weight, as there were machine measure. It was an excellent quality of wheat. The land upon which the wheat grew was summer fallowed. There was likely but few weeds in the grain, as the evidence shows there was a magnificent crop and a heavy yield; and the probabilities are there was very little dockage in the grain.

However, after a painstaking examination of all the evidence in this case, we are satisfied that there is not sufficient substantial evidence to sustain the verdict in regard to the number of bushels of wheat threshed. The plaintiff testifies there were 8,366 bushels of wheat. He arrives at and bases that conclusion wholly upon the amount of the thresh bill, which was approximately \$935, \$9 and a fraction of which was for the threshing of oats, leaving approximately \$925 as the amount of the bill paid for threshing the wheat. The testimony shows that the price per bushel for threshing wheat was 10 cents. The threshing bill thus paid would show about 9,250 bushels of wheat threshed, instead of 8,366. In these circumstances, it can hardly be said that the thresh bill paid is substantial evidence of the amount of wheat which plaintiff claims was threshed. If the amount of the thresh bill paid at the rate of 10 cents per bushel was about the cost of threshing 8,366 bushels of wheat at 10 cents per bushel, then it would be, we think, some substantial evidence of the amount of wheat threshed. The testimony of plaintiff in this regard is insufficient to sustain the verdict. There is no evidence of the number of bushels of wheat threshed as shown by the tally at the completion of the threshing. If there had been such evidence, considering the grade of the wheat and the evidence of the testing of the measuring apparatus, we think it would have been competent and also of a substantial nature. There is evidence of an estimate made by plaintiff prior to the time of the harvesting of the wheat as to the amount it would go per acre; to wit, 30 bushels. We think, however, in view

of all the circumstances, that this testimony, standing alone, is not sufficient to sustain the verdict. The wheat having been threshed, it seems it would be possible to prove by competent testimony the number of bushels so threshed. Johnson, the thresher, it would seem, ought to know the number of bushels of wheat threshed, as shown by the tally. He was not a witness in the case, and there is no showing but what his testimony was available. He certainly must know upon what basis settlement and payment of the thresh bill was made. It appears to us to be quite clear that plaintiff has a cause of action, but it is also equally clear that he has failed to establish it in regard to the number of bushels of wheat threshed; and the burden of proving this at the trial, by a fair preponderance of the evidence, is upon him, and in the event of a verdict in his favor there must be some substantial evidence in the record to sustain it, and we are not able to say there is such evidence. In fact, it is clear that there is not.

We think the issue on the new trial should be confined to the number of bushels of wheat produced upon the land in question and threshed. When that issue is properly and finally determined, that will dispose of the law suit. All the evidence relating to a settlement was submitted to the jury. The evidence in that regard was conflicting, and the jury, by returning a verdict in plaintiff's favor, determined that no settlement was made.

In the new trial, as at the former trial, the debts which plaintiff owes defendant may be deducted from the value of plaintiff's share of the crop, and there may also be deducted therefrom any other valid lien of any other creditor which has been paid by defendant, or otherwise.

The judgment appealed from is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

Appellant is entitled to his costs and disbursements on appeal.

ROBINSON, J. concurs.

BRONSON, J. I concur in result.

BIRDZELL, J. I dissent.

CHRISTIANSON, Ch. J. (concurring). I concur in a reversal of the judgment, for the reason that there is no substantial evidence in the

record to establish the fact that there was any more wheat threshed than that which defendant has already accounted for. In other words, the verdict has no substantial evidence to support it. The plaintiff had the burden of proof. The evidence adduced by him was even inferior to that which this court held to be insufficient in *Miller v. Northern P. R. Co.* 18 N. D. 18, 118 N. W. 344, 19 Ann. Cas. 1215.

STATE OF NORTH DAKOTA EX REL. A. J. ARNOT, Respondent, v. T. E. FLAHERTY, as County Auditor, of Burleigh County, North Dakota, Appellant.

(178 N. W. 790.)

Constitutional law — municipal corporations — statute limiting amount of levies for certain years held to apply to cities and to be constitutional although retroactive.

By chapter 214, Laws 1919, as amended and re-enacted by chapter 61, Laws, Special Session, 1919, it is provided that "for the years 1919 and 1920 the total annual amount of taxes levied for any purpose, except special levies for local improvements and for the maintenance of sinking funds, in any county . . . or in any village, town or city within the state, shall not exceed more than 10 per cent the amount that would have been produced by the levy of the maximum rate provided by law upon the assessed valuation of 1918." And that "in all cases wherein levies have been made or salaries or debts increased, . . . contrary to the limitations prescribed" therein, "the same shall be revised and corrected so as to conform to the provision of chapter 214, Laws of North Dakota," as amended by said chapter 61.

The plaintiff brought this action to restrain the defendant county auditor from applying said act to the levy made by the city of Bismarck in September, 1919, on the grounds: (a) That chapter 214, Laws 1919, did not apply to cities; and (b) that chapter 61, Laws, Special Session, 1919, in so far as it attempted to so apply, is unconstitutional.

For reasons stated in the opinion, plaintiff's contentions are overruled, and it is held that his complaint does not state facts sufficient to constitute a cause of action.

Opinion filed June 22, 1920.

Appeal from the District Court of Burleigh County, *Nuessle, J.*
Defendant appeals from an order overruling a demurrer to the complaint.

Reversed.

Edward S. Allen, State's Attorney for Burleigh County, and *Joseph Coghlan*, for appellant.

The intention of the legislature must be ascertained and given effect in construing statutes. *State ex rel. Langer v. Kositzky*, 31 N. D. 623.

The object of all statutory interpretation and construction is to ascertain and give effect to the legislative intention. *State ex rel. Linde v. Taylor*, 33 N. D. 98; *Power v. Hamilton*, 22 N. D. 179.

Entire statute considered as well as title in construing legislative intent. *Granger v. Lorenzen*, 28 S. D. 295; *Cass County v. Nixon*, 35 N. D. 605.

The rule is well established that an attempt must be made to give effect to the intention of the legislature if a law is doubtful. *Murray Bros. v. Buttler*, 32 N. D. 571; *State v. Stockwell*, 23 N. D. 97.

H. F. O'Hare, for respondent.

Some statutes relating to particular matters are construed to include a county within the term "municipalities." *Herman v. Essex Co.* 71 N. J. Eq. 541, 64 Atl. 742, affirmed in 73 N. J. Eq. 415, 417, 75 Atl. 1101.

And some statutes relating to "counties" have been held to include cities, either in a political (*Wayne County v. Detroit*, 17 Mich. 390; *O'Brien v. Vulcan Iron Works*, 7 Mo. App. 257); or geographical sense (*Dominion Iron, etc. Co. v. Sydney*, 37 N. S. 495); while other statutes are held not to include cities within the term "county" or "counties." *Camp's Appeal*, 80 Conn. 272, 68 Atl. 444; *Thompson v. Peru*, 29 Ind. 305; *Aurora v. West*, 9 Ind. 74.

And in case of doubt as to the construction of either the statute or contract, that construction will be preferred by which no impairment will result. *Texas etc. R. Co. v. Wells-Fargo Exp. Co.* 101 Tex. 564, 110 S. W. 38, affirming (Tex. Civ. App.), 108 S. W. 172 (*Anti-Free Pass. Law*) and see statutes (36 Cyc. 1103).

PER CURIAM. This is an appeal from an order entered by the district court of Burleigh county overruling a demurrer to plaintiff's complaint. The action is one to enjoin the county auditor from reducing the tax levy made by the city of Bismarck for the fiscal year com-

mening September 1, 1919. The complaint alleges that the defendant county auditor, under and by virtue of the authority purported to be conferred upon him by chapter 61, Laws, Special Session, 1919, is about to, and unless restrained from so doing, will "cut down and reduce the tax levy made by the city of Bismarck for said fiscal year. The complaint further avers that said chapter 61 is "retroactive and *ex post facto* in effect, and unconstitutional and void." In other words, the action is one to restrain the defendant county auditor from performing the duties enjoined upon him by said chapter 61, on the ground that said chapter is unconstitutional.

At the regular session in 1919 the legislature enacted chapter 214, Laws 1919, which provides for the limitation of tax levies and debt limits in counties and political subdivisions thereof. The first two sections of the chapter read:

"Section 1. For the years 1919 and 1920, the total annual amount of the taxes levied for any purpose, except special levies for local improvements and for the maintenance of sinking funds in any county or political subdivision thereof, shall not exceed by more than 10 per cent the amount that would be produced by the levy of the maximum rate provided by law upon the assessed valuation of 1918; provided, that for road or school purposes the amount levied may be 20 per cent for 1919 and 40 per cent for 1920, respectively, upon the basis of the assessed valuation of 1918.

"Section 2. No salary of any official now determined on the basis of the amount of the assessed valuation of the taxable property in any county or political subdivision thereof shall be increased, prior to July 1, 1921, beyond the amount now authorized on the basis of the assessed valuation of 1918."

At the special session convened in November, 1919, chapter 214 was amended and re-enacted as chapter 61 of the laws of such special session. As so amended and re-enacted the two above-quoted sections read:

"Section 1. For the years 1919 and 1920, the total annual amount of the taxes levied for any purpose, except special levies for local improvements and for the maintenance of sinking funds, in any county or political subdivisions thereof, or in any village, town, or city within the state, shall not exceed by more than 10 per cent the amount that would be produced by the levy of the maximum rate provided by law

upon the assessed valuation of 1918; provided, that for road and school purposes the amount levied may be 20 per cent for 1919 and 40 per cent for 1920, respectively, upon the basis of the assessed valuation of 1918.

"Section 2. No salary of any official now determined on the basis of the amount of the assessed valuation of the taxable property in any county or political subdivision thereof, or in any city, town, or village shall be increased, prior to July 1, 1921, beyond the amount now authorized on the basis of the assessed valuation of 1918."

The act also contained the following provisions:

"Section 5. In all cases wherein levies have been made or salaries or debts increased, or any duty or power of any official has been limited or extended in excess of or contrary to the limitations prescribed herein, the same shall be revised and corrected so as to conform to the provision of said chapter 214, Laws of North Dakota 1919, as hereby amended. Any county, city, town, village, township, or other officer violating any of the provisions of this act, shall be subject to a fine of not less than \$100 nor more than \$500.

"Section 6. All acts or parts of acts, in so far as inconsistent with provisions of this act, are hereby repealed.

"Section 7. This act is hereby declared to be an emergency measure and shall take effect and be in force from and after its passage and approval."

The plaintiff contends that chapter 214 was not applicable to cities. The respondent, on the other hand, contends that though the language does not in fact include cities, nevertheless the legislature intended that the act should apply to cities. In other words, it is contended that the legislature, in speaking of political subdivisions of counties, meant to include cities. The respondent admits, however, that chapter 61 of the laws adopted at the special session is applicable to cities, but he contends that the law is unconstitutional as so applied.

We do not find it necessary in this action to determine whether chapter 214 as originally adopted applied to cities. The chapter as amended by chapter 61 of the laws adopted by the special session clearly does, and it has not been shown, and the complaint of the plaintiff wholly fails to show, wherein this latter statute, in any manner, contravenes any constitutional provision. That the legislature has power to legis-

late with respect to the subject, and to accomplish the object sought to be accomplished by chapter 214, Laws 1919, we have no doubt. Similar legislation was construed and sustained by this court in *Great Northern R. Co. v. Duncan*, 42 N. D. 346, 176 N. W. 992. It is true the legislation there construed was prospective in its operation, whereas chap. 61, Laws, Special Session, 1919, by its terms is retroactive. But a law is not necessarily invalid because it is retroactive. Such law is invalid only if it violates the constitutional guarantees that no bill of attainder, *ex post facto* law, or law impairing the obligations of contract, shall ever be passed. U. S. Const. art. 1, § 10; N. D. Const. § 16. Unless violative of some right guaranteed by the state or Federal Constitution, tax laws may be given a retroactive effect. 25 R. C. L. p. 795; *McQuillin, Mun. Corp.* § 709.

The complaint in this case sets forth no facts which justify the inference that chapter 61, Laws, Special Session, 1919, impairs any contract obligations. We cannot assume that it will have that effect. The presumption is, it will not. The question whether a law impairs the obligations of a contract will be considered and determined only when it is necessarily involved, and raised by one who has an interest in the determination thereof. *Mohall Farmers' Elevator Co. v. Hall*, 44 N. D. 430, 176 N. W. 131.

The Supreme Court of the United States has said:

"Unless the party setting up the unconstitutionality of the state law belongs to the class for whose sake the constitutional protection is given, or the class primarily protected, this court does not listen to his objections, and will not go into imaginary cases, notwithstanding the seeming logic of the position that it must do so, because if for any reason, or as against any class embraced, the law is unconstitutional, it is void as to all." *New York ex rel. Hatch v. Reardon*, 204 U. S. 152, 51 L. ed. 415, 27 Sup. Ct. Rep. 188, 9 Ann. Cas. 736.

As we construe the complaint, it fails to show either that the plaintiff holds any contract the obligations of which will be impaired, or that any contract obligations whatever have been or necessarily will be impaired.

Upon the oral argument some reference was made to certain items contained in the appropriation ordinance of the city of Bismarck upon which the tax levy involved in this action was based. Appellant's coun-

sel, however, contended that the sole question involved on this appeal is whether the defendant county auditor is justified in carrying out the provisions of chapter 61, Laws, Special Session, 1919, and that the case does not involve the validity of any of the items for which the city commission appropriated money and for which the tax levy in question was made. The correctness of such contention was not seriously questioned by the counsel for the respondent, and, in our opinion, the contention must be sustained. Hence, we do not determine what, if any, reduction the county auditor may make in the tax levy of the city of Bismarck. The presumption is that he will do his duty; that he will permit the tax to stand in such amount as is permissive, and will make such deductions only as are proper. In view of certain arguments advanced both in the briefs and on the oral argument, we deem it proper to say that, while expressing no opinion upon the items involved in the tax levy of the city of Bismarck for 1919, we do not believe that the general city tax referred to and authorized by § 3680, Comp. Laws 1913, includes the tax authorized by §§ 4007, 2006-2035, and 4059; Comp. Laws 1913, respectively, for library, highway, and park purposes. That is, we believe that in cases where these taxes may be, and are, legally levied, they are in addition to those authorized by § 3680, supra. All such taxes, however, are subject to chapter 214, Laws 1919, as amended and re-enacted by chapter 61, Laws, Special Session, 1919.

The order appealed from is reversed, and the cause remanded, with directions that it be dismissed.

CHRISTIANSON, Ch. J., and ROBINSON, BIRDZELL, and BRONSON, JJ., concur.

GRACE, J. I concur in the result.

ROBINSON, J. (concurring specially). I concur in the opinion of Chief Justice Christianson. The purpose of this suit is to enjoin the county auditor from reducing the excessive Bismarck tax levies to the limitations provided by statute. Laws 1919, chap. 214; Special Session 1919, chap. 61. By chapter 214 the annual tax levy of any county or political subdivision thereof (or therein) must not exceed by more than 10 per cent the amount that would be produced by a levy of the

maximum rate on the assessed valuation of 1918. By chapter 61 the annual tax levy in any county, village, town, or city must not exceed by more than 10 per cent the amount that would be provided by a levy of the maximum rate on the assessed valuation of 1918.

By the office of the attorney general, it was held that the limitations of chapter 214 did not apply to a city, because it is not a political subdivision of a county. That construction was entirely too narrow, and it was corrected by chapter 61, though the correction was needless, as the obvious purpose of the first act was to make a uniform limitation on all tax levies. Under the narrow and erroneous construction given to the act, tax levies were made in excess of the limitations. Then there went up a great and continuous roar against the excessive tax levies; now there goes up a similar roar against reducing the erroneous levies to the limitation of the statutes. It shows how some good people are anxious to levy excessive taxes in violation of a plain statute, and then to impugn the law for permitting them to do the wrong, and then they curse the law which forces them to correct the wrong. However, the law must prevail. The wrongs must be made right.

STATE OF NORTH DAKOTA on the Relation of E. E. MAYO, C. F. Weed, and W. E. Nichodemus, Respondents, v. THURSBY-BUTTE SPECIAL SCHOOL DISTRICT No. 37, in McHenry County, North Dakota, and Fred Roble, as Clerk of said Special School District, Appellants.

(178 N. W. 787.)

Schools and school districts — scope of inquiry on certiorari into legality of annexation.

In a certiorari proceeding to review an order annexing territory to the defendant school district, the defendants filed a return admitting the invalidity of the order, and, in addition, set up prior annexation proceedings under which they claimed the territory to have been previously legally attached to the defendant district, though the latter had not exercised jurisdiction based thereon. it is held:

1. Certiorari being a special proceeding and not a civil action, the inquiry under the petition and writ will be confined to the order sought to be reviewed.

certiorari—prior acts of school board not determined in proceeding to review a void order.

2. While a writ of certiorari will not issue unless it may serve some good purpose, where the proceeding is had to review an admittedly void order of a school board, the inquiry to determine whether a good purpose is served thereby will not extend to the determination of the legality of prior acts of the board which may properly be inquired into in the civil action substituted for quo warranto. (Comp. Laws 1913, § 7969.)

schools and school districts—certiorari does not lie to annexation proceedings not depending on jurisdiction.

3. Under § 8445, Comp. Laws 1913, as amended by chapter 76, Session Laws of 1919, the writ of certiorari issues only to review action by inferior courts, officers, boards, and tribunals who have exceeded their jurisdiction, and is not a remedy to determine the legality of annexation proceedings of a school board the validity of which may or may not depend upon jurisdiction.

Opinion filed June 22, 1920.

Appeal from District Court, McHenry County, *Burr, J.*

Affirmed.

McGee & Goss, for appellant.

Section 8445. A writ of certiorari shall be granted by the supreme and district courts when inferior courts, officers, board, or tribunals have exceeded their jurisdiction, and there is no appeal, nor, in the judgment of the court, any other plain, speedy, and adequate remedy, and also when in the judgment of the court it is deemed necessary to prevent a miscarriage of justice.

The questions for consideration are simply these: Have they jurisdiction and have they proceeded according to law in the exercise thereof? *State ex rel. Johnson v. Clark*, 21 N. D. 528, 131 N. W. 715.

The tendency of decision shall be that the writ shall be brought into use; and that whenever used no miscarriage of justice shall be allowed by its technical or constrained application. *Morrissey v. Blasky*, 22 N. D. 430, 134 N. W. 319.

"On review of an order for discovery in aid of execution, it is competent to inquire into the existence of the judgment on which the proceedings are founded." *Weiland v. Krause*, 63 N. J. L. 192, 42 Atl. 835.

"The writ (of certiorari) will be awarded or refused according as it may or may not promote the ends of justice." 11 C. J. 131, § 86.

In the light of the history of the statute and its various amendments, and every reason for the existence of a statute, and under the above decision in 175 N. W. 461, the action of the county commissioners was utterly void, and that this territory remains annexed to respondent school district. School Dist. No. 94 v. Thompson, 27 N. D. 459, 146 N. W. 727, construing what is now § 1240, Comp. Laws 1913.

Our supreme court in every instance has favored a construction requiring a hearing and notice given thereof instead of the contrary. That a want of notice is jurisdictional is the settled law. 35 Cyc. 838; State v. Cook (Wis.) 137 N. W. 746; State v. Clifton, 113 Wis. 107, 88 N. W. 1019; State ex rel. Stengel v. Cary, 132 Wis. 501, 112 N. W. 428; State v. Graham, 60 Wis. 395, 19 N. W. 359; State v. Steele, 106 Wis. 475, 82 N. W. 295.

John E. Greene, for respondents.

BIRDZELL, J. This is an appeal from a judgment entered in the district court of McHenry county in a certiorari proceeding. It was instituted by electors and taxpayers of Maryland school district No. 144 of Ward county for the purpose of obtaining a review of certain proceedings had by the school board of Thursby-Butte special school district No. 37 in McHenry county, by which the latter attempted to attach certain of the territory of the first-mentioned district. The proceedings complained of were originated by the presentation to the defendant district of a petition for annexation, and at a meeting held in June, 1919, the board of the defendant district made an order annexing the lands embraced in the petition. This order is conceded to be void, and no questions concerning it is raised upon this appeal. Upon the complaint setting up the facts showing the invalidity of the order, a writ of certiorari was issued, commanding the defendants to certify the proceedings, with all things appertaining thereto, to the court sitting in Devils Lake on October 31, 1919.

It seems that some time prior to the petition upon which the defendants acted in June, 1919, there had been some annexation proceedings which affected the territory involved in the later petition, and that these had given rise to some litigation which had terminated favorably to the

lefendants. But, notwithstanding the result of that litigation, the defendants had not in fact assumed jurisdiction over the territory. Whether because of misapprehension of the law or otherwise, we need not inquire. The fact is, the defendants did entertain a new petition in May, 1919, and acted thereon in June, 1919. This is the action which forms the basis of the plaintiffs' application in this case and which the defendants admit to be void.

However, the defendants attempted in the first return filed to set up these prior proceedings for the apparent purpose of having it determined that the territory represented by the plaintiffs was in fact legally attached to the defendant district without regard to the void order in June, 1919. Upon motion the original return was stricken and an amended return ordered filed. The amended return reincorporated much of the stricken matter relating to the prior proceedings. But the trial court confined itself to the annexation order of June, 1919, and entered a judgment adjudging it to be void, vacating the same, and giving to the plaintiffs their costs and disbursements. The defendants have appealed from this judgment, and contend here, as in the court below, that the prior proceedings should be reviewed for the purpose of establishing that the territory represented by the plaintiffs is, in reality, legally attached to the respondent district, irrespective of the order which is concededly void. The doctrine contended for by the appellants is that when a plaintiff seeks a review, by certiorari, of proceedings of a board of a quasi municipal corporation to correct action based upon an excess of jurisdiction, the defendant has a right to set up and have litigated all prior matters which might affect the general subject-matter, and thus convert the special proceeding of certiorari into an action of quo warranto, testing the legality of the exercise of corporate power. It is our opinion that this cannot be done.

Counsel rely upon the case of *State ex rel. Johnson v. Clark*, 21 N. D. 517, 131 N. W. 715, for a double purpose. It is claimed it establishes: First, a broad scope for the remedy of certiorari; and, second, that it is directly in point on the facts and the law applicable in the instant case. The case does establish a broad ground for the remedy of certiorari, and we are not disposed to, in any manner, qualify the holding on this point, for the holding manifestly follows from the language of our statute. Comp. Laws 1913, § 8445. But we cannot agree with

counsel that the case is parallel with the one at bar on the facts and the law, nor can we perceive any strong analogy. In that case the plaintiff, who was a resident taxpayer in North Minot, sought to have reviewed the legality of an order entered by the city council of the city of Minot, annexing the territory to the city. The plaintiff predicated the illegality of the order upon the fact that the village of North Minot had previously been incorporated by an order of the county commissioners of Ward county. But as it appeared that the proceedings looking toward the annexation to the city of Minot antedated the proceedings of the county commissioners, it was held that the commissioners acted without authority. Jurisdiction to incorporate the territory named in the complaint could not inhere in both the board of county commissioners and the city council of the city of Minot at the same time. The question of the legality of the action of the county commissioners was not inquired into to any greater extent than was necessary in order to determine the jurisdiction of the defendants to act. That was manifestly necessary because it is the peculiar office of certiorari to attack excesses of jurisdiction. If the defendants were within their jurisdiction, the writ would necessarily be quashed, and whether or not the defendants were within their jurisdiction at the time the annexation order was made depended upon whether the county board had properly assumed jurisdiction when it incorporated the village of North Minot. In the case at bar it is not pointed out that the validity of the order attaching the territory in any way depends upon the prior proceedings. On the contrary, it is admitted that the order is void. A review of the prior proceedings, therefore, could not affect the order attacked. In these circumstances we cannot see the relevancy of that portion of the return which relates to the prior proceedings.

But it is contended that the writ should not issue unless some good purpose may be served thereby, and that if the court would enter into a consideration of the prior proceedings it would develop that the territory affected by the void order was in reality already a part of the district. If this be true, the appellants are not injured by the judgment, as it determines nothing with reference to the validity of any prior *proceedings*. Furthermore, the inquiry necessary to determine whether or not the writ of certiorari serves a good purpose in this case, to be effective, would involve the consideration, possibly, of more than

questions of jurisdiction. It would involve a full test of the legality of the prior proceedings, such as may be had appropriately in a quo warranto *proceeding* or the civil action substituted therefor. Comp. Laws 1913, § 7969; *Weiderholt v. Lisbon Special School Dist.* 41 N. D. 146, 169 N. W. 809; 11 C. J. 129. Apparently the Code of Civil Procedure does not contemplate that a special proceeding of this character can be made the appropriate remedy to determine questions that are properly the subject of a civil action.

Morrissey v. Blasky, 22 N. D. 430, 134 N. W. 319, relied upon by the appellant, decides nothing contrary to the views hereinabove expressed. It was there held that after the district court had, on a proper showing, issued its writ of certiorari, it should not have quashed the writ where, upon the hearing had, it appeared that the plaintiff might have pursued some other remedy. This was a matter that might properly have influenced the discretion of the district judge in issuing the writ in the first instance, but it did not preclude a determination of the merits of the case when once the writ had issued. Upon the hearing it appeared that the justice court, in entering the judgment under review, had in fact exceeded its jurisdiction, and this court properly directed the entry of a judgment in the district court in the certiorari proceeding annulling the judgment of the justice court.

It is also argued that the amendment of § 8445, Comp. Laws 1913, as found in chapter 76 of the Session Laws of 1919, so broadens the scope of the writ of certiorari as to include the review sought by the appellant. To the statute which provided for the issuance of the writ when inferior courts, officers, boards, or tribunals have exceeded their jurisdiction and there is no appeal or any other plain, speedy, and adequate remedy, the amendment added the additional provision that the writ should also issue "when, in the judgment of the court, it is deemed necessary to prevent a miscarriage of justice." Suffice it to say in answer to this contention that the appellants are not applying for a writ of certiorari, and the plaintiffs in the writ have sufficiently stated the grounds for its issuance. It is unnecessary to determine here what a petition should state, in addition to the usual statutory grounds, in order to bring the petitioner within the broadened scope indicated by the amendment.

For the foregoing reasons we are of the opinion that, under the cir-

cumstances disclosed by this record, the trial court properly limited the review to the proceedings of the defendant had in June, 1919, and that the judgment appealed from is correct. The judgment is affirmed.

CHRISTIANSON, Ch. J., and ROBINSON, J., concur.

BRONSON and GRACE, JJ., concur in the result.

JOSEPH WEIDERHOLT and H. J. Geisler, Appellants, v. LISBON SPECIAL SCHOOL DISTRICT No. 19, the Board of Education of Lisbon Special School District No. 19, W. F. Grange, A. M. Kvello, T. A. Curtis, A. C. Cooper, C. D. Clow and W. S. Adams, Respondents.

(178 N. W. 432.)

Schools and school districts—delay of three years held laches precluding assertion of invalidity of annexation proceedings.

A school board entered an order of annexation under § 1240, Comp. Laws 1913, and all parties concerned acquiesced in the order for a period of nine months; thereafter one who had signed the petition and another whose complaint is based wholly on increased taxes brought an action to set aside the order of annexation and recover taxes paid; without sufficient excuse the plaintiffs delayed the prosecution of their suit so that a demurrer was not disposed of for more than a year and a half, and a trial on the merits was not had until more than three years had elapsed after the bringing of the action, during which time there was a settlement of assets and liabilities between the school districts affected, the defendant district making levies and collecting taxes, supplying school accommodations; providing transportation for pupils, and disposing of useless property; it is *held*:

Plaintiffs have been guilty of such laches as preclude them from asserting the invalidity of the annexation proceedings.

Opinion filed May 20, 1920. Rehearing denied June 22, 1920.

Appeal from District Court of Ransom County, *Butts, J.*, sitting at the request of *Allen, J.*

Affirmed.

45 N. D.—36.

M. O. Thompson and Chas. S. Ego, for appellants.

A petition with the statutory number of signers is a mandatory prerequisite. *Stephens v. Jones* (S. D.) 123 N. W. 705; *West End v. State* (Ala.) 36 So. 423; *Borchard v. Ventura County* (Cal.) 77 Pac. 708; *People v. Stratton* (Colo.) 81 Pac. 245; *People v. Pike* (Ill.) 64 N. E. 393; *Atty. Gen. v. Rice*, 31 N. W. 203; *Yard v. Ocean Beach* (N. J. L.) 5 Atl. 142; *State v. Jenkins* (Mo.) 25 Mo. App. 484; *Kaiser v. Lawrence* (Iowa) 8 N. W. 772; *McGarahan v. Mining Co.* 96 U. S. 316; *Page v. Board, etc.* (Cal.) 24 Pac. 607; *People v. Linden* (Cal.) 40 Pac. 115; *Re Taylorport* (Pa.) 13 Atl. 224; *Dartmouth Sav. Bank v. School Dist.* 6 Dak. 332.

After the petition had been signed by all but two persons one of the members of the defendant board unlawfully added more territory. This act rendered the petition void as to those whose lands were affected by such charge, and as to all petitioners. *White v. Hass* (Ala.) 70 Am. Dec. 548 and note; *Inglish v. Breneman* (Ark.) 41 Am. Dec. 96; *Walsh v. Hunt* (Cal.) 53 Pac. 115; *Ins. Co. v. Martindale* (Kan.) 88 Pac. 559; *Bacon v. Hooker* (Mass.) 58 N. E. 1078; *Erickson v. Bank* (Neb.) 62 N. W. 1078; *Newman v. King* (Ohio) 43 N. E. 683; *Bank v. Mullen* (Okla.) 120 Pac. 257; *State ex rel. Merriweather v. Campbell* (Mo.) 25 S. W. 392.

Notice in the form and manner prescribed by § 1240, Comp. Laws, is a prerequisite to complete annexation. Unless this is done the board does not obtain jurisdiction. *State v. Schols* (Kan.) 20 Pac. 523; *State v. Lentton* (Iowa) 5 N. W. 613; *Butterfield v. School Dist.* 61 Me. 583; *Coulter v. School Dist.* (Mich.) 26 N. W. 649; *Howard v. Forester* (Ky.) 59 S. W. 10; *Hyser v. Township Board* (Mich.) 91 N. W. 1020; *State v. Steele* (Wis.) 82 N. W. 295; *Gentle v. School Inspectors* (Mich.) 40 N. W. 928.

There is a distinction between acts complete and incomplete. *Price v. Fargo*, 18 N. D. 296.

It is not mere matter of lapse of time, but change of situation during neglectful repose, rendering it inequitable to afford relief. *O'Brien v. Wheelock* (U. S.) 46 L. ed. 627; *Goss v. Herman*, 20 N. D. 295; 2 Pom. Eq. Jur. p. 917; *Wilson v. Auger* (Ill.) 52 N. E. 289; *Manning v. Mulrey* (Mass.) 78 N. E. 551; *Smith v. Linder* (S. C.) 58 S. E. 610; *Foote v. Harrison* (Wis.) 119 N. W. 291; *Shiffer v. Morien*.

(Pa.) 74 Atl. 426; *Foot v. Hambrick* (Miss.) 35 Am. St. Rep. 631 and note; *Erickson v. Bank* (Neb.) 62 N. W. 1078.

Annexation is an arbitrary power, the delegation of such power is always strictly construed, with all doubts resolved against the recipient of that power. *Ster v. Fargo*, 18 N. D. 289; 19 R. C. L. Municipal Corporations, ¶ 75, note 8.

Kvello & Adams, for respondents.

The following cases hold that laches is not a mere matter of time, but principally a matter of inequity, in permitting the claim to be enforced founded upon some change in the conditions or relations of the parties. *Greenfield School Dist. v. Hannaford Special School Dist.* 20 N. D. 393; *State ex rel. Frish v. Nohle*, 16 N. D. 168; *Sherer v. Hutterische Bruder Gemeinde* (S. D.) 134 N. W. 63.

An estoppel may arise from laches covering a period of time shorter than that prescribed by suit. *Kennedy v. McKenzie* (S. D.) 127 N. W. 597.

When a person with actual or constructive knowledge of the fact induces another by his words or conduct to alter his position, such person is estopped from repudiating the transaction to the other's prejudice. *McDonald v. Beatty*, 10 N. D. 511; 16 Cyc. 791, 792; 2 Pom. Eq. Jur. § 809.

BIRDZELL, J. This is a second appeal in an action to enjoin the defendants from asserting jurisdiction over and levying and collecting taxes upon certain territory that had been annexed to the defendant school district; also to recover taxes paid. The first appeal was from an order sustaining a demurrer to the complaint, and it was held that the complaint stated a cause of action. See *Weiderholt v. Lisbon Special School Dist.* 41 N. D. 146, 169 N. W. 809. After the reversal of the order sustaining the demurrer, the defendants answered, impleading Tuller school district No. 25 and Island Park school district No. 13, as municipal corporations, from which the attached territory included in the defendant district under the annexation proceedings had been severed. The defendants then pleaded by way of defense the proceedings had for the purpose of annexing the territory in question to the Lisbon school district, the tax levies made and spread against the annexed territory for the years 1915, 1916, 1917, and 1918, and the

laches of the plaintiffs in the commencement and prosecution of this action. This is an appeal from a judgment of dismissal and for costs. The facts necessary to an understanding of the questions presented upon this appeal may be briefly stated as follows:

The school district of the city of Lisbon is known as special school district No. 19, and, prior to the annexation proceedings in question, it embraced only the territory within the corporate limits of the city of Lisbon. Lisbon is located in the northern part of Island Park township, there being a narrow strip of the territory of such township lying between the city of Lisbon and Tuller township, which lies immediately north of Island Park township. Island Park and Tuller townships form common-school districts of Ransom county, numbers 14 and 25, respectively.

For a considerable period of time prior to the spring of 1915, the question of the consolidation of the schools in the Tuller township district had engaged the attention of the school voters. Consolidation had twice been voted upon and defeated, the last time in the spring of 1915. Another election was called, to be held on June 15, 1915, and it appears that some of the voters, of whom the plaintiff Geisler was one, who desired to defeat the consolidation proposition, consulted Mr. T. A. Curtis, an attorney of Lisbon, with reference to the approaching election. Curtis was at the time a member of the school board in Lisbon, and Geisler, though living in Lisbon, was a taxpayer in the Tuller school district. After consulting with Curtis, a petition was circulated by one Hammond, who was actively opposing consolidation. The petition prayed for the annexation to the Lisbon school district of one quarter section in Island Park township and school district, and eight sections in Tuller township and school district. The petition was liberally signed by the school voters throughout Tuller township. After the signatures were obtained, Hammond took the petition to Curtis's office, and, following some discussion relative to the sentiment of the people of the township as to having more territory attached to the Lisbon district, the petition was changed by adding to it the description of twelve sections in the southern part of Tuller township. It was then presented to the school board, and steps were taken to perfect the annexation by an attempted compliance with § 1240, Comp. Laws 1913. An order of annexation was made on June 25, annexing the twenty sections em-

braced in the petition. Thereafter the territory was at all times treated as annexed to the Lisbon school district. The following spring, about the time the taxes became due, the plaintiff Geisler consulted the firm of Butler & Thompson, attorneys in Lisbon, who later instituted this suit. That firm was dissolved soon after the action was begun, and when the complaint was filed a demurrer was interposed, which was not disposed of in district court until December, 1917, a period of approximately two years and a half after the annexation proceedings.

It is claimed that these proceedings were defective by reason of the alteration of the description of lands embraced in the petition without the consent of the signers; that the petition was not signed by two thirds of the school voters residing in the territory situated a greater distance than 3 miles from the central school; that there were no signers upon the petition in the Island Park school district, from which it was proposed to take a quarter section of land; and that the notices of meeting for consideration of the petition were not properly posted.

To these contentions the respondents reply that the members of the defendant school board, aside from Curtis, acting on the petition, had no knowledge that the petition was altered after it was signed and before it was presented to the board; that the petition was acted upon in the belief that it contained sufficient signatures of school voters residing more than 3 miles from the central school; that in so far as the failure to post proper notices affects Island Park district, that district is not complaining, and appellants are not affected by such defect in the proceedings, if any; and that in any event the appellants are precluded by laches from asserting the invalidity of the order of annexation.

Obviously, if the respondents' last contention is correct, all other questions become immaterial; for it is well settled that courts will not intercede to set aside the apparently void proceedings of municipal or quasi municipal bodies at the instance of persons who have, in equity and good conscience, forfeited their right to complain. Where a party is precluded by laches, it matters little how serious may be the defect in the proceedings which he is prone to attack, so long as they are apparently regular. Thus, it is even held that, though the law under which a municipal body purports to act in extending the corporate limits be unconstitutional, proceedings thereunder will not be held valid in

favor of one who is precluded by laches from objecting to the proceeding. *State ex rel. West v. Des Moines*, 96 Iowa, 521, 31 L.R.A. 186, 59 Am. St. Rep. 381, 65 N. W. 818. See also *Speer v. Kearney County*, 32 C. C. A. 101, 60 U. S. App. 38, 88 Fed. 749. Upon the facts presented by this record, we think it clear that the plaintiffs and appellants are no longer in a position to assert the invalidity of the proceedings.

Geisler was one of the original moving parties. His name is on the annexation petition, and he had knowledge of its alteration before it was presented to the board, but he refrained from mentioning the fact to the board. And although he was a taxpayer in Tuller township, he apparently acquiesced in the assumption, by the Lisbon district, of jurisdiction over the territory taken from the Tuller district. He stood by while the latter district levied the taxes necessary to operate the schools under their jurisdiction, and made arrangements to pay, and did pay, for transporting pupils. He made no objection until taxpaying time the following spring. In the meantime the regular proceedings for the division of assets and liabilities had been had, the schools had been operated by the Lisbon board, and a new board appointed in the Tuller district with jurisdiction over the remaining territory. This board made no effort to claim jurisdiction over the portion annexed to Lisbon. Not only was this plaintiff negligent in asserting his rights by demanding a vacation of the annexation proceedings, but after the action was begun for that purpose it was allowed to drag along for a year and a half without even disposing of the demurrer to the complaint. The record shows that the attorneys for the defendants were in no wise to blame for this delay, and, in fact, no excuse is shown other than the illness of one of the plaintiffs' attorneys and changes made in partnership arrangements. In justice, however, it should be said that the delay is in no wise attributable to the defendants' present attorney. But it does appear that no sufficient excuse existed either for the delay in bringing the action or for the delay in pursuing it after it was brought. In the matter of great importance to a large number of people affected, those who oppose proceedings which purport to be conducted on behalf of all are in duty bound to proceed with such a degree of expedition as will minimize the inconvenience incident to the setting aside of the proceedings attacked. In this case, four tax levies had

been made and collected before the trial of the action, and the Lisbon district has, at all times, proceeded in such a manner as to accommodate the school population; during a portion of the time conducting a separate school in one part of the rural section of the district, and at all times making arrangements for the transportation of the pupils. Also disposing of property which could not be advantageously used under the new arrangement. Neither the plaintiff Geisler nor the other plaintiffs have offered to do equity, but, on the contrary, they assert the right to recover taxes paid.

While the position of the plaintiff Weiderholt is somewhat different in that he did not sign the petition and was not as active as was Geisler in obtaining the favorable action of the Lisbon school board, he was shown the petition, and says that he came to the conclusion that it was not legal; and, to use his own words, he said, "I never bothered my head about it." He did not send his children to the public schools, and he testified that it was altogether a question of taxes with him. There can, of course, be no assurance that the taxes would not have been as great in the original Tuller school district if the consolidation plan had been again voted upon and carried. As for the delay, the plaintiff Weiderholt gives no other or different excuse than Geisler. Upon these facts we are of the opinion that all of the plaintiffs are guilty of laches, precluding the relief sought in this action. *Greenfield School Dist. v. Hannaford Special School Dist.* 20 N. D. 393, 127 N. W. 499, and cases therein cited; 28 Cyc. 214. A parallel situation and a similar conclusion will be observed in the following excerpt from the opinion of the supreme court of Arkansas in the case of *Black v. Brinkley*, 54 Ark. 372, 15 S. W. 1030. "Moreover, the appellant delayed for more than eight months after the order of annexation was made before filing the petition to annul it. No excuse is offered for the delay. If the circuit court had acted upon the petition at the next term after its presentation, the lapse of time would have been such that it is fair to presume that jurisdiction had been assumed by the municipality over the annexed territory, with whatever of expense is necessarily incident thereto; that taxes had been assessed and paid for municipal purposes; and that the citizens residing within the annexed territory had participated in electing town officers. Great confusion would have arisen from a quashal of the order. It is now nearly four years since the

territory was declared a part of the town, and the causes for confusion have multiplied as time elapsed. We should therefore be slow to hold that the circuit court had abused its discretion in withholding the use of the writ, and slower in exercising that discretion ourselves at this time. The rule is to refuse the writ where the party seeking it fails to show that he has proceeded with expedition after discovering that it was necessary to resort to it, and especially where great public inconvenience will result from its use."

On this record the trial court has found that the plaintiffs were guilty of laches. In our opinion this finding is amply supported, and the judgment rendered below proper. It is in all things affirmed.

CHRISTIANSON, Ch. J., and BRONSON, J., concur.

ROBINSON and GRACE, JJ., dissent.

GEORGE MEYERLE, Respondent, v. THE PIONEER PUBLISH-
ING COMPANY, a Corporation, Appellant.

(178 N. W. 792.)

Libel and slander—general, special, and exemplary damages may be awarded for libel per se.

1. In an action against a newspaper for publishing an article, libelous per se, the party injured, under constitutional and statutory provisions, may be awarded general, special, and exemplary damages.

Damages—general damages defined—"actual damages"—compensatory damages.

2. General damages, considered synonymous with actual or compensatory, and as contradistinguished from exemplary or punitive damages, in an action for libel, are such as the law implies and presumes to have occurred from the wrong complained of. They are such as naturally and necessarily result from the wrong. In actions for libel (or other tort), general damages are such as are not caused by any incidental fact or by the peculiar situation and circumstances of the party, but are the natural and uniform effects of the injury itself.

Damages — special damages defined.

3. Special damages, as contradistinguished from general damages, are those which are the natural, but not the necessary, consequences of the act complained of. They are such as actually result from the wrong, but are not such a necessary result that they will be implied by law. In cases of libel (or other tort), it may be said that special damages are such consequences of an injury as are peculiar to the circumstances and condition of the injured party.

Libel and slander — full retraction does not bar recovery of damages.

4. Pursuant to § 9652, Comp. Laws 1913, which provides for a demand of retraction concerning the publication of libelous matter in a newspaper prior to the institution of any action for libel, and for an opportunity of retraction in the newspaper, the person injured by a publication libelous *per se* is not limited, although full retraction has been made, to the recovery of only special damages. He may recover his actual or compensatory damages.

Libel and slander — purpose and effect of statute as to retraction defined.

5. The evident purpose and intent of such statutes, § 9652, Comp. Laws 1913, considered in connection with the constitutional provisions concerning the right of free speech and publication, and the right of redress for legal wrong occasioned thereby, is to afford an opportunity to mitigate the actual or compensatory damages recoverable, by showing the absence of malicious intent, and to eliminate exemplary damages, by means of a full retraction made, as an element of recovery.

Libel and slander — allegation of demand for retraction and of special damages unnecessary.

6. In an action for the publication in a newspaper of an article libelous *per se*, it is not necessary, in order to state a cause of action for at least nominal damages, to allege service of a demand for retraction pursuant to § 9652, Comp. Laws 1913, and to allege special damages.

Libel and slander — complaint for libel against newspaper held to state cause of action for at least nominal damages.

7. In an action for libel against a newspaper, where the complaint has failed to allege notice of a demand for retraction under § 9652, Comp. Laws 1913, and has also failed to allege any special damages, and where demurrer has been interposed thereto upon the ground that such complaint does not state a cause of action by reason of such failure, it is held that the complaint states a cause of action for at least nominal damages.

Opinion filed June 26, 1920.

'Action for civil libel against a newspaper in Morton County, *Nuessle*,

J.

The defendant has appealed from an order overruling the demurrer.

Affirmed.

Sullivan & Sullivan, for appellant.

Where a cause of action exists only because of special damage suffered by the plaintiff, such damage must be specifically pleaded. 8 Standard Proc. 920; 18 Standard Proc. 921; *Williams v. Smith*, 134 S. C. 249, 46 S. E. 502.

When the statute reads "before any suit for libel shall be brought," this notice shall be given five days before bringing suit, we cannot give any other construction to it than that this is a condition precedent to the bringing of the suit. *Crocker v. Hartford* (Conn.) 66 Atl. 98; *Reining v. Buffalo*, 102 N. W. 308, 6 N. E. 792; *Williams v. Smith*, 134 N. C. 249, 46 S. E. 502; *Scarborough v. Watson*, 140 Ala. 349, 351, 37 So. 281 and cases cited therein.

M. A. Hildreth, for respondent.

The complaint states a cause of action. *Patmont v. International C. M. Co.* (Minn.) 171 N. W. 302; *Tillison v. Robbins*, 68 Me. 295; *Chase, Torts*, p. 124.

In cases where the defamatory words are actionable in themselves, malicious intent in publishing them in always inferred by law, and therefore no proof is necessary. Newell, *Defamation, Slander & Libel*, p. 770, § 19; 3 *Sutherland Code Pl. Pr. & Forms*, p. 2371, § 3914.

In certain classes of cases an action for defamation may be maintained without proof of special damages to the plaintiff; and in these cases the words are said to be actionable *per se*. *Starkie, Slander*, 3d Eng. ed. 98.

PER CURIAM. This is an action for libel. The defendant has appealed from an order overruling a demurrer to the complaint. The defendant is engaged in the business of publishing the *Mandan Daily Pioneer*, a newspaper published at Mandan. The complaint alleges that on December 16, 1919, the defendant published on the front page of its newspaper the following:

Would Help the Lord End the World.
Glen Ullin Man Invites Family to One Last Feast under Parental Roof,
Buys Shrouds for All—Only Needed Machine Gun.

George Meyerle, sixty years old farmer of Glen Ullin, is so sure the world is coming to an end to-morrow that he decided to help the Lord out

in so far as he personally and his immediate family and their children and wives are concerned.

A wholesale sacrifice by the gun route was all scheduled by Meyerle until some of the members of the family learned of his plans and have interfered.

Some days ago he wrote letters to all the members of his family,—he has six married children,—advising them all to come home and have a last feast before the end of the world, December 17th.

Then, it is said, he bought shrouds for himself and all the rest of his family and proposed to-day to anticipate the end of the world by a twenty-four-hour span. He bought a gun and proposed to use it on himself and offered to perform a like service on the rest of the family if they would give their consent. At least, he asked, would they be present at the time of his taking off, meet at the parental home, and under the roof which sheltered them in their youth await the crack of doom.

However, all of the family expressed themselves as being willing to await the trump of Gabriel's horn, and were opposed to believing what some pessimistic professor of starology might predict after a mental avianic among the planets. His kindly offer to help the Lord bring about the millenium has been courteously refused.

Meyerle believes everything he hears. Huh? Certainly he is an ardent follower of Townley.

It further alleges that such publication was false and defamatory, and that the plaintiff was injured in his good name, fame, and reputation as a citizen and resident of Morton county, in the sum of \$10,000. The defendant demurred to this complaint upon the ground that the same did not state a cause of action.

The defendant contends that the failure of the plaintiff to plead a demand for retraction, as required by statute, shows no cause of action. That the statute which requires a demand for a retraction before a suit for libel can be brought against a newspaper allows only special damages whether retraction has been made. That, without a showing of a demand for retraction and a refusal to retract, the plaintiff is limited to special damages to his property, business, trade, profession, or occupation, under the statute. That, furthermore, the complaint is fatally defective because it fails to plead in any manner special damages.

Concerning the demand for retraction, § 9652, Comp. Laws 1913, reads as follows:

"Before any suit for libel can be brought against a newspaper, other than a libel of, or concerning a female, the party aggrieved must, at least three days before filing his complaint, serve notice on the publisher of such newspaper at the principal office of its publication, specifying the statement alleged to be false and defamatory, and then if on the trial it appears that the article was published in good faith, and its falsity was due to a misapprehension in regard to the facts and a full and fair retraction of the erroneous statement was published in the next issue of the paper, or in the case of a daily paper within three days after the mistake was brought to the attention of the publisher, in as conspicuous a place and type as the original article, the plaintiff will be entitled to recover only such damage as he can show he has sustained to his property, business, trade, profession or occupation. But if the libel is against a candidate for office, the retraction must also be made editorially, and in the case of a daily paper at least three days, and in the case of a weekly paper, at least ten days before the election."

The demurrer to the complaint admits allegations of falsity, publication, and notice. 17 R. C. L. 398; 25 Cyc. 468; McCue v. Equity Co-op. Pub. Co. 39 N. D. 190, 167 N. W. 228. The demurrer tests the actionable character of the charge, and will be sustained only where the court must affirmatively say that the publication is incapable of any reasonable construction which will render the words defamatory. 25 Cyc. 468; McCue v. Equity Co-op. Pub. Co. *supra*. Libel is the false unprivileged publication, by writing, printing, picture, effigy, and other fixed representation to the eye which exposes any person to hatred, contempt, ridicule, or obliquy, or which causes him to be shunned or avoided, and which causes him to be injured in his occupation. Comp. Laws 1913, § 4552. If the language as charged fairly imputes to the plaintiff such acts of conduct, which would naturally be followed by the consequence named in the statute, it is libelous *per se*. *Lauder v. Jones*, 13 N. D. 525, 541, 101 N. W. 907. If, as a matter of law, there is any doubt concerning the construction to be placed upon the language used, and if there is doubt upon which reasonable men might differ concerning the effect of the publication of such article, these are matters for the consideration of the jury. *Ibid.*; McCue v. Equity Co-op. Pub.

Co. *supra*. In determining the true character and significance of the article, we believe that the jury might find either that it charges an attempt to commit a crime or crimes, or that it charges mental incapacity. In either event pursuant to statute it would be actionable. 25 Cyc. 252, 259, 277; *Adams v. Scott*, 33 S. D. 194, 145 N. W. 446; *Hanson v. Krehbiel*, 68 Kan. 670, 64 L.R.A. 790, 104 Am. St. Rep. 422, 75 Pac. 1041; *Park v. Detroit Free Press Co.* 72 Mich. 560, 1 L.R.A. 599, 16 Am. St. Rep. 544, 40 N. W. 731; 17 R. C. L. 286. See §§ 10,337 and 10,338, Comp. Laws 1913. The article being susceptible of the determination that it is libelous *per se*, the plaintiff, in the absence of the statute requiring a demand for retraction, would be entitled, upon the complaint, to recover in this state all damages to which he would be entitled, including actual or compensatory, and punitive or exemplary.

The questions for consideration, therefore, upon the contentions of the defendant are:

(1) Whether a demand for retraction in an action for libel against a newspaper must be served in all cases; and,

(2) The extent to which the statute applies for the recovery of damages where there has been no retraction or opportunity afforded to make retraction.

The statute prescribes, as above noted, that, where full retraction has been made, the plaintiff will be entitled to recover only such damages as he can show he has sustained to his property, business, trade, profession, or occupation. The contention of the defendant, that such damages refer only to special damages to his property, business, trade, profession, or occupation, is erroneous.

Section 9, N. D. Const. so far as applicable, provides: "Every man may freely write, speak and publish his opinions on all subjects, being responsible for the abuse of that privilege."

Again, § 22, N. D. Const., so far as applicable, provides: "All courts shall be open, and every man for any injury done him in his lands, goods, person or reputation shall have remedy by due process of law, and right and justice administered without sale, denial or delay."

By the Constitution, the right of free speech and free publication is guaranteed. By this Constitution, the right of redress for injuries done through the abuse of this privilege is also guaranteed. *McCue*

v. Equity Co-op. Pub. Co. *supra*; Park v. Detroit Free Press Co. 72 Mich. 560, 1 L.R.A. 599, 16 Am. St. Rep. 544, 40 N. W. 731; Hanson v. Krehbiel, 68 Kan. 670, 64 L.R.A. 790, 104 Am. St. Rep. 422, 75 Pac. 1041.

This right of redress for injuries done extends, under the Constitution, to a person's reputation, as well as to his land, goods, and person. For a wrong perpetrated upon a person's reputation he may recover his damages. Generally speaking, there are recognized two classes of damages in libel cases, general damages and special damages. The term "general damages" is considered synonymous with actual damages or compensatory damages. *Osborn v. Leach*, 135 N. C. 628, 66 L.R.A. 648, 650, 47 S. E. 811; 17 C. J. 710. They are such damages that ordinarily result or flow proximately from the publication of a libel. These damages to a person's reputation, although they may not be capable of objective measurement in actual dollars and cents, nevertheless, they are not speculative; they neither require special allegation nor special proof. They are capable of being reduced to money values by reason of the law's presumption that an injury done to a person's feelings, the public shame and disgrace incurred, and the degradation of his reputation, are a substantial loss. These damages are in the nature of a property right; they have been said to constitute property. See 17 C. J. 710, 829, 841; See *Newell, Libel & Slander*, p. 841; *Pratt v. Pioneer-Press Co.* 35 Minn. 251, 28 N. W. 708; *Cruikshank v. Bennett*, 30 Misc. 232, 62 N. Y. Supp. 118; *Adams v. Scott*, *supra*; 17 R. C. L. 430, 431; *Osborn v. Leach*, *supra*.

Special damages, on the contrary, refer to a special pecuniary loss that may have been sustained on account of the peculiar circumstances and condition of the party injured, but are not such a necessary result that they will be inferred by law from the character of the words used. *Hanson v. Krehbiel*, *supra*; *Newell, Libel & Slander*, p. 849; 17 C. J. 715. Such damages may constitute elements of actual damages. The statute also permits, in libel actions, punitive or exemplary damages. *Comp. Laws 1913*, § 7145. It also allows the recovery of nominal damages. *Comp. Laws 1913*, § 7184. See also 17 C. J. 714.

Under the Constitution and statutory provisions, and the principles of law applicable thereto, the statute in question should be given a construction that will render it consistent with the fundamental and

cognate law, and harmonious with the evident purpose and intent for which the statute was enacted.

In *Hanson v. Krehbiel*, supra, a Kansas statute very similar to the statute quoted herein was considered. Under that statute where a retraction had been demanded of a newspaper libel and a full retraction had been made, the party was limited in recovery to only actual damages suffered in respect to his property, business, trade, profession, or occupation, and no other damages whatever. This statute was held to be unconstitutional. We do not so determine this statute to be unconstitutional. Its evident purpose and intent, in our opinion, is to afford an opportunity to the newspaper against whom the libelous charge is directed to mitigate the actual or compensatory damages recoverable by showing the absence of malicious intent, and also the right, by means of a full retraction made, to eliminate exemplary damages as an element of recovery. It is quite proper for such statute, consonant with the constitutional principles, to permit an opportunity for full retraction for such purposes in the same medium in which the libelous charge has been made. It is plainly evident, therefore, that, regardless of whether a retraction has been fully made or not, the person subjected to a libel *per se* is not limited in his recovery to special damages. Although it might be competent for the legislature to prescribe, as a condition precedent, a demand for a retraction in any newspaper libel before any action could be instituted (which question we do not decide), nevertheless, we are satisfied, pursuant to the evident purpose and intent of the statute, that the legislature did not so intend in the enactment of the statute in question. The question accordingly, of the necessity of serving a demand for retraction, must be considered in connection with the purpose of the statute. This matter has been considered in several states upon similar statutes.

In *Clementson v. Minnesota Tribune Co.* 45 Minn. 303, 47 N. W. 781, an action was brought against a newspaper for libel. A demurrer was interposed that no cause of action was alleged for the reason that the plaintiff failed to allege a demand for retraction as required by the statute. Justice Mitchell wrote the opinion. In part he states:

"Now it is evident that the sole purpose of this statute in requiring notice to be served before suit is to give the publishers of the paper an opportunity to publish a retraction; and the only effect of the re-



traction, if made, in case it appears on the trial that the article was published in good faith, and that its falsity was due to mistake or misapprehension of the facts, is to prevent the recovery of general damages and limit it to actual damages. The retraction, if made, does not affect in the least the recovery of actual damages. So far as the right to recover such damages is concerned, the service of the notice referred to would be a mere idle and useless ceremony, which the legislature cannot be presumed to have contemplated or intended. Hence, notwithstanding the general language of the first clause of the statute, yet, as it is only the right to recover general damages which the legislature was seeking to limit, and as the service of notice or a consequent retraction can have no possible effect upon the recovery of actual damages, it should be held that the provision as to the service of notice has reference only to a claim for damages of the former class. Hence, as this complaint states a cause of action for actual damages, it was good as against a general demurrer."

See also 17 R. C. L. 392; *Foye v. Guardian Printing & Pub. Co.* (Cir. Ct. N. Y.) 109 Fed. 369; *Hanson v. Krehbiel*, 68 Kan. 670, 64 L.R.A. 790, 104 Am. St. Rep. 422, 75 Pac. 1041; *Osborn v. Leach*, 135 N. C. 628, 66 L.R.A. 648, 650, 47 S. E. 811. The defendant has cited the cases of *Williams v. Smith*, 134 N. C. 249, 46 S. E. 502, and also *Osborn v. Leach*, *supra*, to the effect that a demurrer should be sustained where the demand for retraction, pursuant to the statute, has not been alleged. It is to be noted, however, that, in *Osborn v. Leach*, decided after the *Williams v. Smith* case, *supra*, although the opinion as written so holds, the majority of the court dissented upon this special question, and this majority opinion holds that such notice is required for the purpose of furnishing the defendant an opportunity to publish a retraction, the effect of which extends no further than to relieve from punitive damages. In this regard the court says:

"When such demurrer is sustained, the action should not be dismissed, but the court can still permit, in its discretion, the plaintiff to amend the complaint by averring such notice, if it was in fact given; and, if it was not, the action is still valid for the recovery of actual damages; that is, of all except punitive damages, and it would be error to dismiss it."

To summarize, we are of the opinion:

(1) That the sole purpose of the statute is to give the publisher of a newspaper who, through mistake or misapprehension in regard to the facts, in good faith publishes a libelous article, an opportunity to retract and thereby as far as possible undo the wrong which he unintentionally did to the party libeled.

(2) That it is not the purpose of the statute to take away from the party libeled right to full reparation for the injury he has sustained. The party who unintentionally committed the wrong is merely permitted as far as possible to undo it, and thereby mitigate the damages. But if any damages remain after the retraction has been made, the party libeled is entitled to recover them.

(3) That the only effect of the retraction, if made, is, in case it appears on the trial that the article was published in good faith, and that its falsity was due to mistake or misapprehension in regard to the facts, that the plaintiff will be entitled to recover only whatever damages then remain. That is, in such case the plaintiff will not be entitled to recover exemplary damages; nor will he be entitled to recover any more general or special damages than sufficient to compensate him for the injury remaining unsatisfied after the publication of the retraction.

(4) Whether a complaint like the one before us, which alleges merely general injury to plaintiff's good name and reputation, and does not allege the service of a demand for retraction, sets forth a cause of action for more than nominal damages, is one upon which the majority members are not wholly agreed, and that question is not determined. The majority members, however, are agreed that such complaint, in any event, states a cause of action for nominal damages.

It follows, therefore, that the trial court did not err in overruling the demurrer. The order is affirmed, with costs to respondent.

CHRISTIANSON, Ch. J., and BIRDZELL, and BRONSON, JJ., concur.

GRACE, J. (dissenting). Section 4352, Comp. Laws 1913, provides: "Libel is a false and unprivileged publication, by writing, printing, picture, effigy or other fixed representation to the eye, which exposes any person to *hatred, contempt, ridicule, or obloquy, or which causes*

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him to be shunned or avoided, or which has a tendency to injure him in his occupation."

This section sets forth the elements that constitute libel. Unless all these elements are alleged in the complaint, no libel is shown to have occurred. What is written or printed of one may be false; but, if it has not exposed him to hatred, contempt, ridicule, or obloquy, or caused him to be shunned or avoided, or has no tendency to injure him in his occupation, under the statute, there is no cause of libel alleged.

These elements of libel must be alleged in order to state a cause of action, just as in an information charging a crime, the elements of the crime must be alleged in order to legally charge its commission, such as the intent to commit the crime, the acts constituting it, and the injury, if any, resulting therefrom, etc.

Unless these elements are present, there is no libel. There is nothing to show an invasion of a personal right. There is no allegation of injury to support the recovery of any damages; and it must be clear, if there is no injury, there is no damage.

The complaint in this case states none of the elements of libel, as defined by our statute, excepting that the publication was false. This, standing alone, is entirely insufficient to state a cause of action.

The complaint, for another reason, states no cause of action. Section 9652, Comp. Laws 1913, is fully set out in the majority opinion. It requires, before any suit can be brought against a newspaper, other than the libel of or concerning a female, that the party aggrieved must, at least three days before filing the complaint, serve notice on the publisher of such newspaper, at the principal office of its publication, specifying the statement alleged to be false and defamatory; in other words, serving a notice demanding the retraction of the matter claimed to be libelous. No such notice was served in this case, in the manner required by law.

For this reason, the complaint does not state a cause of action. There is no allegation showing any attempt to comply with that statute, so that the rule of liberal construction of a pleading might apply.

The section referred to is all inclusive; it includes each one of all and every suit. It says, "Before any suit"—that means every suit. The word we are to legally define and construe is the word "any." It has been construed in the following cases, to mean what we have above

stated: *Hopkins v. Sanders*, 172 Mich. 227, 137 N. W. 709; *Garrison v. Perkins*, 137 Ga. 744, 74 S. E. 541; *James v. State*, — Okla. Crim. Rep. —, 33 L.R.A.(N.S.) 827, 113 Pac. 226.

There is no cause of action stated in the complaint, for any kind of damages, including nominal damages.

The order overruling the demurrer was erroneous. It should be reversed and the case remanded, with an order to dismiss the same without prejudice to the plaintiff, to bring another action for damages for the alleged libel.

ROBINSON, J. (dissenting). This is an appeal from an order overruling a demurrer to the complaint, which is for newspaper libel. The case is of little consequence; it does not warrant the expense of booking a lengthy decision. In a libel suit the rules of pleading are precisely the same as in any other action. The complaint must state facts sufficient to constitute a cause of action. When it fails to state a cause of action, then, for that reason, the defendant may demur to it. In stating the facts the complaint may aver that the libel was published concerning the defendant, without any colloquium to demonstrate it. Comp. Laws, § 7463. That does not change the rules of pleading; neither are the rules changed by any presumption of law or fact. Presumptions do not aid a complaint which fails to state a cause of action.

The statute does specifically provide that before commencing an action for newspaper libel, except in regard to a female, a notice to retract the libel must be served on the publisher, and then, if he does fairly retract, there can be no recovery in excess of actual damages, which the plaintiff must prove. Laws 1901, chap. 119; Comp. Laws, § 9562. Now as the complaint must state all facts necessary to show a cause of action, in this libel suit it must show that, before commencing the action, a retraction notice was served on the publisher. Otherwise, the retraction statute must be held void.

Here is the gist of the complaint. It avers that the plaintiff, sixty years, and a farmer of Glen Ullin, is so sure the world is coming to an end to-morrow that he has written all the members of his family,—his six children,—advising them to come and have a last supper at the parental home; that he has bought shrouds for himself and his family, and a gun to end the life of himself and the family, if they consent.

It also avers that the libel is false and defamatory. The complaint does not aver that a retraction notice was ever served. It does not aver that the publication was malicious, or that it did the plaintiff any actual injury by causing him pain, sorrow, grief, humiliation, or by causing his neighbors to shun or ridicule him. It avers that the plaintiff was injured in his good name and fame as a citizen and resident of Morton county.

But it is said that the libel is actionable *per se*, and that in such a case nominal damages will be presumed. Hence it is argued that the complaint states a cause of action for nominal damages. That might be true were it not for the statute which provides that the damages must be proven, and not presumed. Under the plain words of the statute, no such action may be commenced without first serving a retraction notice; and if the publisher does fairly retract, the plaintiff is entitled to recover only such damages as he can show he has sustained. The constitutional right to a remedy for all wrongs to person, property, or character means all substantial wrongs. It does not mean that, to recover 10 cents or nominal damages, a party may subject the county to the expense of \$100 or \$1,000. The policy of the law is to discourage libel suits, because, in general, they are a nuisance to the public and a nuisance to the parties. A suit for \$50,000 or \$1,000,000 may last for a week or a month and result in a verdict for 6 cents, the same as the famous Ford Case and the Barnes-Roosevelt Case.

The policy of the law is to give freedom to the press, to permit a newspaper to publish items of interest, without incurring the expense and delay of a special investigation, which would bar the publication of proper news items, and, as we have said, the complaint contains no averment that the publication was malicious, and the demurrer does not admit any fact that is not alleged,—and the libel itself contains no fair inference of malice. It does not convey the idea that the publisher knew anything of the plaintiff.

The occasion of the libel was thus: An alleged scientific astrologist in California gave out the item that the world would come to an end on December 17, 1919. In many newspapers the item was published, with comments. It frightened many people and caused some to commit suicide. Since 1841 there has been a religious cult known as Adventists and Seven-Day Adventists. They have been looking for

the millenium and the end of the world at certain scheduled times. Such good people are numerous, and they have many churches, and are quite susceptible to fake reports concerning the millenium. It is quite possible that the plaintiff is some kind of an Adventist, and that his neighbors gave out some such report as was published as a raillery on him. If he is an Adventist, he should not take offense at imputations quite common to those of that creed. If he is not an Adventist, such raillery should be to him as water on a duck's back.

As the plaintiff is a farmer of sixty years, his fame must be local. "It begins and ends in the small circle of his foes and friends." To those who know him the millenium item is no news—no gospel truth; to those who know him not, it is the same as if it referred to a person by any other name.

Certain it is the complaint does not aver malice, it does not aver the service of a retraction notice, it does not show any actual injury to the name or fame of the plaintiff. Hence, it does not state a cause of action.

T. E. DAVIS, Respondent, v. HARRY W. LONG, Appellant.

(178 N. W. 936.)

Landlord and tenant — right to occupy farmhouse incidental to employment ceases with the service.

1. The occupancy of a house by a man hired to operate a farm for a certain monthly wage, and the use of the house thereon to live in with his family, is incidental to the employment, and the right thereto ceases with the termination of the service. In such case the possession of the employee is in legal effect, the possession of the employer.

NOTE.—For authorities discussing the question of right of one who was in peaceable possession to maintain forcible entry and detainer against another entitled to possession, who forcibly dispossesses him, see notes in 8 L.R.A.(N.S.) 426; 32 L.R.A.(N.S.) 51; and L.R.A.1918B, 670.

On character of occupation of premises by servant which will entitle the master to resume possession immediately upon termination of the services, see note in 4 L.R.A.(N.S.) 703.

On right of owner of land to effect an entry thereon, see note in 19 Am. St. Rep. 544.

Forcible entry and detainer — rule that occupancy of house by employee is incidental to operation of farm and ceases with service, not abrogated by statute.

2. This rule is not abrogated or changed by § 7175, Comp. Laws 1913, which provides that "for forcibly ejecting or excluding a person from the possession of real property the measure of damages is three times such a sum as would compensate for the detriment caused to him by the act complained of."

Opinion filed July 3, 1920.

Appeal from the District Court of Morton County, *Hanley, J.*

Defendant appeals from a judgment and from an order denying a motion for judgment notwithstanding the verdict or for a new trial.

Reversed.

Nichols & Kelsch, for appellant.

The employee is not deemed to have any distinct possession, his possession being deemed in law, during the employment, that of his employer, without any rights surviving the employment. 16 R. C. L. p. 582, § 57; *Lane v. Au Sable Electric Co.* Ann. Cas. 1916C, 1112 note; *Wood, Master & S.* 2d ed. § 155, p. 304; *DeBrair v. Mintrum*, 1 Cal. 450.

Master has the right to use force reasonably necessary to expel servant. 16 R. C. L. p. 582, § 57.

The master may eject the servant from possession of the house or apartments if he had been discharged, without giving him notice to quit. *Bourland v. McKnight & Bros.* 4 L.R.A.(N.S.) 706 note, and authorities cited in support thereof.

Sullivan & Sullivan and *J. A. Hoder*, for respondent.

CHRISTIANSON, Ch. J. Plaintiff commenced this action in a justice's court of Morton county to recover the possession of certain real property situated in that county, and for treble damages for having been ejected therefrom. In his complaint the plaintiff averred that he "was rightfully and peaceably in possession of a certain farm and dwelling house, barns and sheds thereon, described as follows, to wit: Northwest quarter of section thirty-four (34), township one hundred thirty-four, range eighty, Morton county, North Dakota;" and "that on the 4th day of September, A. D. 1917, the defendant forcibly entered

thereon, and in a forcible manner and without authority disseised the plaintiff and ejected and put him out of said lands and tenements, and by force and violence, and by threats and intimidation, and with a strong hand, kept him out therefrom, to his damage in the sum of \$50, whereby defendant, by force of § 7175, Comp. Laws 1913, forfeited and became liable to pay treble the amount of such damages." The prayer for judgment was that plaintiff have judgment for treble damages, and "for the possession and restitution of said premises and house and dwelling." The answer was a general denial. The trial in the justice's court resulted in a judgment in favor of the plaintiff for \$83.85 damages, and possession of the premises. The defendant appealed to the district court and demanded a new trial. In the district court defendant's answer was amended so as to set forth that the plaintiff occupied the premises as defendant's servant; that the contract of service had been terminated, and plaintiff requested to remove from the premises. The trial in the district court was to a jury. A verdict was returned in plaintiff's favor for \$60 damages. Judgment was entered pursuant to the verdict, and defendant has appealed from the judgment and from the order denying his motion for a judgment notwithstanding the verdict or for a new trial.

The plaintiff is a married man with a family. In July or August, 1919, he entered into an agreement with the defendant, by the terms of which he agreed to manage defendant's farm. The plaintiff, in his testimony, gives the following version of the arrangement:—

"I told him that I would come over and run his place for a certain consideration. . . . The consideration was \$65 a month, and it was agreed that he was to furnish us the provisions, 30 bushels of potatoes, 700 pounds of live meat, 400 pounds of sugar, 700 pounds of flour, the product of the poultry that was on the place, and the product of four cows,—three cows at that time were milking. That was to be included in the \$65 a month. He was to furnish us with our board and the home property, the residence. . . . He said we were going to live in the farm home, and they were to give us possession two weeks after we came there, and they gave us possession immediately upon our arrival."

The plaintiff further testified that it was understood that the arrangement so made was to continue for a period of one year. The

defendant testified substantially the same so far as it related to the character of the arrangement and the compensation to be paid; but he denied that there was any understanding that the arrangement was to continue for a year or any other fixed period; he claimed that it was understood that it might be terminated by either party whenever he, for any reason, became dissatisfied. He further testified that it was not the understanding that the plaintiff and his family were to occupy the dwelling house, but that they were to occupy another house designated as the "tool house." It appears, from the evidence without dispute, that when plaintiff and his family arrived, defendant and his family were occupying the dwelling house, and that both families staid therein for some days. Part of plaintiff's household goods were placed in the tool house and part in the dwelling house. Plaintiff further testified that for certain reasons of convenience he deemed it desirable to move his family to the town of Solen,—a short distance from the farm; but that it was understood they would later move back on the farm and occupy the dwelling thereon. That it was agreed that plaintiff and his family might occupy the dwelling until such time as defendant's family moved back, at which time it was understood plaintiff and his family would move into and occupy the tool house. The undisputed testimony shows that defendant had another hired hand who had been in his employ on the farm for about a year, and that such hand remained on the farm at all times, occupying his quarters and continuing to perform his work as before plaintiff was employed.

It is undisputed that plaintiff entered upon the premises about August 6, 1917. On or about September 2, 1917, some difficulty arose between the parties, with the result that defendant notified plaintiff that the contract between them was terminated. They went to a bank at Solen and made settlement; and it is undisputed that plaintiff was paid in full for all services rendered to that time. It is further undisputed that defendant, at that time, informed plaintiff that defendant's family would move back on the farm, and requested plaintiff to vacate the dwelling house. On September 4, 1917, defendant's wife and a servant named Wright came to the premises with two loads of household goods. They had written instructions from the defendant to take possession of the house, and to use whatever force was necessary for that purpose. There is a square conflict in the evidence as to what

took place after defendant's wife and Wright arrived at the farm. Defendant's wife denies that any force whatever was used in taking possession. She testified that she merely opened the door and went into the house, where she found plaintiff's wife and daughter sitting apparently ready to leave the house, and with all their belongings ready to move. On the other hand, the plaintiff and his wife testified that the doors were locked, and that defendant's wife and Wright broke the door off its hinges, and in this way effected an entrance. Plaintiff further testified that defendant's wife and Wright thereafter put the furniture which they had brought into the house, and moved his furniture,—“a portion of it into a rear room, and a portion of it in a house outside, and a portion of it on the porch.” The plaintiff and his wife did not leave, however. It is undisputed that both families staid in the house that night; and that plaintiff, also, staid there the next night. In the meantime plaintiff had consulted his attorney, and the present action had been instituted. Plaintiff testified that at the time of the trial in justice's court his furniture remained on the premises; but that, upon the advice of his attorney, he had moved them before the case was tried in the district court.

The trial court instructed the jury, *inter alia*, as follows:

“It makes no difference, if Mr. Long here was entitled to the possession of the house, if, as a matter of fact, the plaintiff, Mr. Davis, was in peaceable possession of the house, Mr. Long would have no right to take possession of it by force; and the reason for that is, the possession of property, the possession of a home, is the cause of a great many conflicts in the past under our laws. A man in a home has a right to make his home his castle and exclude everybody from it. On the other hand, the man who owns a place has a right to its possession, and a great many conflicts have arisen where one man says he is entitled to a house and wants it, and the other man says, ‘This is my house, my home, and I am rightfully in possession.’ The law has therefore sought to prevent the taking of property by force. So we have a statute which provides that a person, even though he is entitled to possession, cannot go and use force to oust another person from a house if that person is there in peaceable possession.

“So it is not a question as to when the contract was terminated, or whether or not the contract was terminated. The house was in the

peaceable possession of the plaintiff, Mr. Davis. Now, then, the question is, Did Long forcibly take possession from him or eject him? And, if he did, then this plaintiff should recover. . . . Even though you are satisfied from the evidence that the defendant, that is Mr. Long, was the legal owner of the premises in question, and was lawfully entitled to the possession thereof, still, if it is further proven that the plaintiff was in the actual and exclusive peaceable possession, and I charge you as a matter of law that he was, then the defendant would have no right to forcibly enter and expel the plaintiff therefrom.

"The question of the contract or agreement that was entered into between these parties, as to whether the plaintiff was to stay there a year or by the month, is not material to the issues in this case. The question is, under what circumstances was the possession of the premises taken away from Davis, if it was taken away. That is the material question for the jury to determine from the evidence in the case. . . . Under the statutes of this state, the measure of damages for forcibly ejecting a person from the possession of real property, the measure of damages is three times such a sum as would compensate him for the detriment caused to him by the act complained of; so that, if you find for the plaintiff, you will determine from the evidence such sum as would compensate him for the detriment caused him."

On this appeal, defendant, under appropriate specifications of error, argues that the evidence was insufficient to justify the verdict; and that the court erred in its instructions to the jury. The various specifications rest upon the contention that the contract between plaintiff and defendant was one of employment; that it created the relation of employer and employee, and not that of landlord and tenant; that the occupancy by the plaintiff of the premises was connected with the service, and necessary for its performance; that the possession of the plaintiff was, in legal effect, the possession of the defendant, his employer. After a careful consideration, we have reached the conclusion that these contentions are correct. Clearly the agreement between the plaintiff and defendant was one for service. In order to properly perform such service plaintiff must have some place to live. The occupancy of the house was incidental to the service. Such occupation was convenient for, if not essential to, the proper performance of the service; and the right to occupy such premises was obtained solely by reason

of the contract of hiring. The possession was not exclusive; for, as has been noted, the other hired hand remained upon the premises as before.

"The question has frequently arisen as to whether a transaction by which a person is to occupy or manage real estate of another is to be considered a lease or a mere employment as agent or servant. In a particular case due to the informal manner in which such agreements are evidenced, the question whether the relation is that of landlord and tenant, or not, is usually primarily for the consideration of the jury or other tribunal whose function it is in the given instance to determine issues of fact; still if the action is being tried in a court consisting of a judge and jury, it is unnecessary to submit to the jury the character of the occupation, if that depends upon the significance of substantially undisputed facts, and diverse inferences may not reasonably be drawn therefrom. If there is no reservation of rent *eo nomine* or substantially, this is a strong consideration to show that no lease was intended, whereas if there is a stipulation for the payment of rent *eo nomine* or substantially, this is a material consideration tending to show that the occupation was as a tenant. And the fact that the compensation of the landowner is a stated part of the profits received by the other party from the use and occupation of the premises does not prevent the transaction from being considered a lease. The circumstance that the right of occupation terminates with the abrogation of the contract of service, by consent or by the discharge of the servant, is not decisive. The question is, What was the character of the holding under the contract? And there is no reason why the fact that a servant is engaged for a definite period should be treated as an element in determining the character of the occupancy. So, while a deduction from wages of a specified sum for the use or the absence of such an arrangement would be a material circumstance, it would not be, in all cases, conclusive either way. The question depends upon the nature of the holding, whether it is exclusive and independent of and in no way connected with the service, or whether it is so connected, or is necessary for its performance.

"Frequently, in connection with one's employment, he is given the right to occupy a dwelling house or apartments of his employer. In such a case, if the occupancy is directly incident to the service, or is

required for the necessary or better performance of the service, he is generally considered as occupying merely as a servant, and not as a tenant, and the possession is that of the master; and to render the occupation that of a servant it is not necessary that the occupation of the house be a necessary or essential incident to the service to be performed; it is enough if such occupation is convenient for the purpose of the service, and was obtained by reason of the contract of hiring. Thus, where A employed B to work in his mill, agreeing to pay him certain wages per day and to give him the use of a house which was part of the mill property, and which had before been occupied by B while working in the mill, it was decided that B held the house as a servant, and not as a tenant. So the occupancy of a house by a farm hand and his family, who are hired to do work connected with the farm for a certain price per day and the use of the house to live in, is incidental to the employment, and the right thereto ceases with the termination of the service, the possession being all the time that of the owner." 16 R. C. L. pp. 578-580, §§ 53, 54. See also Labatt, Mast. & S. 2d ed. §§ 78-83; Bowman v. Bradley, 151 Pa. 351, 17 L.R.A. 213, 24 Atl. 1062; MacKenzie v. Minis, 132 Ga. 323, 23 L.R.A.(N.S.) 1003, 16 Ann. Cas. 723, 63 S. E. 900; Lane v. Au Sable Electric Co. 181 Mich. 26, Ann. Cas. 1916C, 1108, 147 N. W. 546; Debriar v. Minturn, 1 Cal. 450; McQuade v. Emmons, 38 N. J. L. 397; note in 4 L.R.A.(N.S.) pp. 704-706; 19 Cyc. p. 1139, and cases cited in note 36.

Plaintiff, however, contends that the common-law rule has been abrogated by § 7175, Comp. Laws 1913, which reads: "For forcibly ejecting or excluding a person from the possession of real property, the measure of damages is three times such sum as would compensate for the detriment caused to him by the act complained of." In other words, it is contended that this statute makes the actual possession of real property the test; that holding, or the right to hold, may be dispossessed only by means of an action of forcible entry and detainer or an action of ejectment. The instructions quoted indicate that those contentions were sustained by the trial court.

We do not believe that § 7175, supra, is susceptible of the interpretation so placed upon it. The statute is penal in its nature. It purports to punish the party who comes within its terms by requiring him

to pay three times the amount of damages he actually caused. It is elementary that such a statute should be strictly limited to the cases to which the lawmakers intended that it should apply. The statute relates to the measure of damages. That is all it purports to affect. It in no manner changes the relative rights and obligations of an employer and an employee as respects the possession of premises furnished to and occupied by an employee incidental to the employment. The statute applies only in case the party sought to be charged with liability has "forcibly ejected or excluded a person from the *possession* of real property." In the eyes of the law a servant who occupies real property incidental to and as a part of his employment is not in possession thereof as against his master. He has no estate in such property. Comp. Laws 1913, § 5304. His possession is the possession of the master. See authorities cited above.

The case of *Heffelfinger v. Fulton*, 25 Ind. App. 33, 56 N. E. 688, decided by the appellate court of Indiana, is almost identical with the case at bar. In that case the plaintiff was employed by defendant as a farm hand, and, as part of his compensation, was given the occupancy of a house and garden. On being ejected from the premises, he brought an action against his employer for trespass. The court ruled that the action would not lie; that the relation between the parties was that of master and servant, and not that of landlord and tenant, and that "Burns's Rev. Stat. 1894, § 7118, providing that any person who shall unlawfully detain lands from the person having the right to the possession thereof shall be liable for damages for such retention, has no application to cases where the relation between the landowner and occupant is that of master and servant, since the possession of the servant is that of the master." Syllabus, ¶ 2. In the opinion in that case the court said: "Section 7118, Burns's Rev. Stat. 1894, is relied upon by appellant. This statute is not applicable in a case like this. In every case covered by the statute, *possession* is contemplated. . . . It does not apply to a case where there is not, and cannot be, possession in the occupant. It cannot apply to a case like the one under consideration, where, by contract, the relation assumed between the landowner and the occupant is that of master and servant. Appellant had no possession. His possession was that of the appellee, his employer. It could not survive the contract of hiring, to which it was incidental,

and under which it was a part of the price for services to be performed by appellant. When appellant's contract was cancelled, his right to occupy the premises terminated." 25 Ind. App. 37.

In considering a similar question the supreme court of Pennsylvania said: "The subject of the contract was labor. Labor was what Bradley needed and undertook to pay for. It was what Bowman undertook to furnish him at an agreed price. The labor was to be performed upon the land, in its cultivation, in the care of the cows, and the delivery of the milk. As Bowman was not a cropper or a tenant paying rent, his possession of the land and the cows and the implements of farm labor were the possession of his employer. The barn was used to stable the cattle and store their feed. The house was a convenient place for the residence of the laborer. The house, the barn, the land, the cattle, the farming tools, were turned over into the custody of the man who had been hired to care for the property; but he had no hostile possession, no independent right to possession. His possession was that of the owner, for whom he labored for hire." *Bowman v. Bradley*, 151 Pa. 559, 17 L.R.A. 216, 24 Atl. 1063.

Reference has been made to the decision in the case of *Iron Mountain & H. R. Co. v. Johnson*, 119 U. S. 608, 30 L. ed. 504, 7 Sup. Ct. Rep. 339, and to the decision of the New Jersey court of errors and appeals in the case of *Schwinn v. Perkins*, 79 N. J. L. 515, 32 L.R.A.(N.S.) 51, 78 Atl. 19, 21 Ann. Cas. 1223. Those cases have no application in this case. The facts in those cases were wholly different from the facts in the case at bar. The first case was one in which a contractor, who had constructed a portion of a railroad under a written contract, was ousted from possession without being paid for his services. The second case was one wherein the party dispossessed claimed the right of possession as a tenant. In that case the New Jersey court expressly recognized the doctrine that the possession of the servant is, in the eyes of the law, the possession of the master. The court said: "That mere occupancy or personal presence upon the ground is not sufficient to constitute that possession which the law clothes with legal rights is shown by a few illustrations. *There may be possession without occupancy, as where a man's servant is in the actual occupancy of the property, holding possession for him, or where a man has temporarily gone out of his house, leaving no one in charge, but still having legal possession;*

and there may be a case of occupancy without possession, as where, in a man's absence, a mere stranger, visitor, or trespasser goes into his house without claim of right." 32 L.R.A.(N.S.) p. 54.

This is not, however, the only occasion the New Jersey court has had to consider this question. The precise question adverted to was squarely involved in *McQuade v. Emmons*, 38 N. J. L. 398, wherein the court said: "It appears from the affidavit that the plaintiff, McQuade, was employed by the defendant, Emmons, by the month; that as a compensation for the services to be rendered by McQuade, he was to receive from the defendant \$25 a month, and the use of a house for himself and his family, so long as he might work for the defendant in an acceptable manner; that under this agreement the plaintiff went into the occupancy of the house in question, the same being the tenant house standing and being upon the property owned by the defendant, known as Edge Hill, on Stockton street, in the borough of Princeton, and engaged in the service of the defendant; that he continued in such service and occupancy until the defendant, becoming dissatisfied with the plaintiff, discharged him from his employment, whereupon the plaintiff quitted his service, but refused to leave the house at the defendant's bidding. It was admitted in the argument that the tenant house so described was on lands upon which the defendant resided, and of which he was in actual possession during all the time of the plaintiff's employment. Under the contract set forth, McQuade was not the tenant of Emmons, nor could he be proceeded against, or claim to be treated as a tenant. The agreement shows their relation to have been that of master and servant, and not of landlord and tenant. The occupation of the house by McQuade and his family was part of his compensation for the performance of his engagement with the defendant; it does not show any demise of the house; the possession of McQuade was the possession of his employer, and when he was dismissed from service, and the legal relation existing between them thereby put an end to, his right of occupancy was ended, and his longer remaining on the premises of his master was a trespass. *Rex v. Stock*, 2 Taunt. 339, 127 Eng. Reprint, 1109, 2 Leach, C. L. 1015, Russ. & R. C. C. 185, 11 Revised Rep. 605; *Guest v. Opdyke*, 31 N. J. L. 553; *Doe ex dem. Hughes v. Derry*, 9 Car. & P. 495; *State, Edgar, Prosecutor v. Jewell*, 34 N.J.L. 260. 'Many servants,' says Mansfield, Chief Justice, in

Rex v. Stock, 'have houses given them to live in, as porters at park gates. If a master turns away his servant, does it follow that he cannot evict him till the end of the year?' And in the same case Lord Ellenborough asks, 'if a man assigns to his coachman the rooms over his stable, does he thereby make him his tenant?' It is abundantly clear that the claimant, by his own showing, makes no case of which the justice could take cognizance under the act concerning landlords and tenants."

Reference has also been made to the statute providing for the action of forcible entry and detainer. It is well to bear in mind the purpose and scope of this action as so provided. Our statute was originally enacted by the territorial legislative assembly, and was construed by the supreme court of the territory of Dakota in *Murry v. Burris*, 6 Dak. 170, 42 N. W. 25. The court said:

"A comparison of the statutes of Iowa (Code of 1873) and the statutes of California of the same year will make it quite apparent that the person or persons who drafted our statute of forcible entry and detainer had before him or them the enactments of these two states, and that they borrowed from them such parts as they deemed suited to this locality, and rejected the other parts of those statutes which they deemed unsuited. They added new sections and provisos in place of those rejected, the effect of which will be apparent as we proceed. The first remarkable change is in the phraseology of the first subdivision above quoted. The Iowa subdivision reads as follows: (1) 'Where the defendant has, by force or fraud or stealth, entered upon the prior actual possession of another in real property and detains the same.' Iowa Code, 1873, § 3611. The material change, as will be observed, consists in placing the words 'of another' after the words 'real property' in our statute, instead of after the words 'actual possession,' as in the Iowa statute, whereby the meaning of the sentence is made to be (if the pronoun 'another' is made to qualify as its antecedent the noun immediately preceding, according to the usual rules of construction) that this action is maintainable where a party has entered by force, etc., upon the prior actual possession of another's real property, while the meaning of the Iowa statute must be construed to be that the proceeding is maintainable where a party by force, etc., has entered upon another's prior actual possession; and if this change was intentional, as it will be presumed to have been, and the word 'another' is made to qualify

its preceding noun as antecedent, then the difference in the two statutes is radical in this respect,—that, while the Iowa statute applies to all real property, and makes the party who enters by force, etc., upon his own as well as upon the real property of another, held adversely guilty of this offense, our statute makes the party guilty only who enters by force, etc., upon the real property of another; and, while it would be no defense in Iowa to allege and prove that the defendant was the owner of the premises alleged to have been unlawfully entered, it would be a perfect defense under our statute, which confines the remedy to lands of another so entered upon. If this were the only change made in adopting the Iowa and California statutes, the court might feel some hesitancy in employing this usual and natural construction of language, but our legislature did not stop here. It proceeded to emphasize this construction, and to enact in terms that the forcible entry and detainer act, in its enforcement by justices of the peace, should not extend to cases in which the title to real property should in any wise come in question. . . . These provisions are not found in the Iowa or California codes. It is an original provision. It is clearly intended to oust the jurisdiction of the justice when the defendant pleads title, and is intended to confine this remedy to that of protecting the private right of lawful possession, and to give the owner a summary remedy for recovering possession, from the intruder or wrongful holder of his real property. To hold otherwise would be to treat the words of the statute requiring the justice to certify the cause to the district court, ‘whenever the title to or boundary of real property in any wise comes in question,’ as idle and meaningless. The title to or boundary of real property could never come in question unless it was put in question by a contesting party, either by the pleadings or the evidence offered; and if the contesting party could not raise the question of title or boundary to real property, and if the legislature intended that the owner of real property should not be heard to assert his title in such cases, it was a work of supererogation for it to enact that ‘whenever such title should come in question’ the case should be certified to the district court. . . .

“We have no doubt, from a careful examination of the provisions of our statute upon forcible entry and detainer, as well of other sections of contemporaneous statutes as of those subsequently enacted, that the construction intended to be given by the legislature and the construc-

tion which should be given to it by the courts is that it is a civil remedy, designed to furnish an owner of real property—that is, one having a general or special title sufficient to give him the right of possession—a summary remedy to recover such possession from one who has wrongfully ousted him, and is a mere trespasser or intruder without color of right to the premises. . . .

“We cannot adopt the construction of this statute which is contended for by attorneys for the plaintiff, that any actual possession merely of real property is a sufficient basis for this action. That one party may enter upon the peaceable possession of another and wrongfully eject him, and that the person so ejected may not peaceably regain possession, but must resort to an action to expel the intruder, it cannot be that such wrongful intruder may invoke the power of the court to dispossess the rightful occupant who has merely reclaimed his own. If so, then the statute, in its construction, permits ‘a party to take advantage of his own wrong,’ in violation of a fundamental maxim of the law. . . . The statute was not intended to break down and destroy all the rights of possession and property that have come down to us from the earliest period of the common law.”

Of course it does not follow that, because the plaintiff occupied the premises as an employee, defendant might, with impunity, summarily eject him. The plaintiff would of course, even upon a dismissal, be entitled to a reasonable time in which to vacate. And, of course, if defendant violated the terms of the contract of employment, the plaintiff would be entitled to recover from the defendant whatever damages he sustained by reason of defendant’s breach of the contract. But the plaintiff has not sought to recover on the ground of breach of contract. The question of whether defendant had the right to, and did in fact, terminate the contract of employment, was expressly taken away from the jury’s consideration. So was also, in effect, the question as to whether plaintiff was afforded reasonable opportunity to vacate. Under the instructions the jury was required to return a verdict for the plaintiff even though they might be of the mind that the defendant had the right to terminate, and had in fact terminated, the contract of employment; and even though plaintiff had been afforded every reasonable opportunity to vacate the premises. And, these questions could not

very well have been submitted under the complaint and plaintiff's theory of the case.

It follows from what has been said that the judgment and order appealed from must be reversed, and the cause remanded for further proceedings not inconsistent with this opinion. It is so ordered.

ROBINSON and BIRDZELL, JJ., concur.

ROBINSON, J. (concurring specially). I can conceive of no possible reason or excuse for commencing or prosecuting this action, and am surprised that one of our learned justices should dissent from the decision as formulated by Chief Justice Christianson. The dissent is based on a gross misconception of facts and the law governing the relation of master and servant. When a man employs a servant with a wife, and admits them to his house, and furnishes them their daily bread and butter, and pays them a monthly or daily wage, he does not thereby surrender to them the possession of his house. Their occupation is that of a mere temporary licensee, the same as that of the help in a hotel. They are bound to obey orders, and must obey an order to quit the house the same as an order in regard to their employment. It is no uncommon thing for the proprietor of a hotel to leave the business in charge of his help, while he gives general direction and pays the bills, and goes and comes as he pleases. On his return, after an absence of a day or a month, may the help say to him: We have possession of the hotel; you cannot enter; you cannot get actual possession, unless at the end of a lawsuit? If such were the law, it would be very dangerous for a man to employ help. Business is never done in that way.

The dissenting opinion errs in this way. It says: The plaintiff was in the actual, peaceable, and exclusive possession of the house; it was his home. That is clearly untrue; it was not his home, and he never had actual or exclusive possession for one minute. There never was a minute when defendant did not have the right to enter into his house and to give orders to the plaintiff. It is true, as said in the dissent: "The fundamental rights of a person in actual, peaceable, and exclusive possession of property *as his home* is well understood." But the plaintiff never was in possession of the house *as his home*. His possession and occupancy was not exclusive; it was not *as his home*. It was as

the *home of the defendant*, who paid the plaintiff his wages, furnished him his bread and butter for obeying orders. As the Scripture reads: The servant is not above his master. His service or employment does not make him the lord of his master or give him any possession as against his master. The rule is not changed by calling the master an employer and the servant an employee.

Really the case seems too plain to admit of any discussion. It is ruled by common law, common usage, and common sense.

GRACE, J. (dissenting). The facts are stated at length in the majority opinion. There is no need of a restatement of them.

As it appears from the statement of facts in the majority opinion, the plaintiff entered into the peaceable possession of the dwelling house upon the farm where he worked, and he was in actual peaceable possession of it when the defendant evicted him and his family therefrom, by force.

Defendant sent his wife and servant to the farm with written instructions, which were, in effect, to use as much force as was necessary to take possession of the premises, including the residence occupied by the plaintiff. This, the defendant had no right or authority, under the law, to do. He had no right nor authority to take possession of the premises at all excepting by a lawful method. He did, however, take possession by force, in violation of § 9069, Comp. Laws 1913.

Plaintiff brought an action for forcible detainer under that section, and for damages. The measure of damages in such case is as provided by § 7175, Comp. Laws 1913. He recovered a judgment for his damages, and that judgment should be affirmed.

BRONSON, J. I dissent. The majority opinion practically holds that a person who is in the actual peaceable and exclusive possession of a house that is his home and his fireside may be ejected therefrom, together with his wife, his children, his goods, and his chattels, by force, because, forsooth, he is a mere employee, and not a tenant. The employer is made both the judge and the executioner of what he may deem his rights to be. Such opinion does not state in terms, but does in effect, a rule of might instead of right, a rule of men instead of a rule of law. The record facts, as found by the trial court and the jury,

and as warranted by the evidence, disclose that the plaintiff was in the actual, peaceable, and exclusive possession of the house. It was his home; there he had his family, his goods, and chattels; the defendant was not in the actual possession of the house, and had not been for nearly a month. The defendant's home, his family, his goods, and chattels had been in the town of Solen. By force and a show of force, by breaking through a locked door, by threats of personal assault and even of burning, the defendant forcibly ejected the plaintiff, his family, his goods, and chattels from the premises, and seized the actual possession thereof, with his family and his goods and chattels. The fact that the plaintiff was then an "employee" in his own home, instead of a "tenant" in his own home, did not make the defendant in the actual possession of this home, any more than if he had been a tenant.

If the plaintiff were a tenant at will, the defendant might terminate the contract of leasing, with or without cause. If the plaintiff were an employee, the defendant likewise might terminate the contract of hiring. But, in either case, he had no right by force and by threats to forcibly seize the possession of a home of which he was then not in the actual possession. This is a case of seizing, and not of defending, a home.

The majority opinion quotes a portion of the instructions of the Honorable J. M. Hanley, the trial judge. His instructions were fairly given and ably stated. With clear and able legal analysis, he stated the residual issues of fact for the jury.

The majority opinion criticizes these instructions for the reason that the issues of whether the defendant had the right to, and did, terminate the hiring, and whether the plaintiff was afforded a reasonable opportunity to vacate the house, were expressly withdrawn from the consideration of the jury. This is not an action upon a contract, or for the breach thereof. It is not an action by the defendant in the nature of ejectment or for unlawful detainer. If such was the nature of this action, the criticisms might apply. This is an action for forcible intrusion and unlawful trespass.

The fundamental rights of a person, in the actual, peaceable, and exclusive possession of property as his home, are well understood. They are axiomatic in common-law jurisprudence. They need not be stated. If the defendant had terminated the hiring, whether with or without

cause, and if he had already given to the plaintiff a reasonable opportunity to vacate the house, he needed not personal militant force, nor the strong arm of might, to secure actually his legal right of possession. He did not need to hear, determine, and execute his own professed legal right. The law, the instrumentality of and for civilization, was ready and able to hear, to determine, and to enforce his rights, orderly, peaceably, and without legal wrong. In this case, if the plaintiff had been militant, personal injury, if not crime, might have occurred. The defendant, in such case, had an expeditious statutory remedy. Comp. Laws 1913, § 9069, specifically provides for the maintenance of a forcible detainer action where one by force, or by menaces and threats of violence, unlawfully holds and keeps the possession of any real property, whether the same was acquired peaceably or otherwise. In such case no written notice to vacate the premises was required. The action could be maintained quickly and effectively in the justice's court. The defendant might invoke other legal remedies. This same statute, in another subdivision, permits likewise the maintenance of such action who "when a party entering peaceably upon real property turns out by force, threats, or menacing conduct the party in possession." Comp. Laws 1913, § 9069, subd. 2.

Section 7175, Comp. Laws 1913, to which the majority opinion refers, provides treble damages for forcibly ejecting or excluding a person from the possession of real property. Forcible entry is constituted if force is either actually applied, or if it is present and threatened, and justly to be feared. *Wegner v. Lubenow*, 12 N. D. 95, 104, 95 N. W. 442. It supplements well the forcible detainer statute.

These statutes, co-ordinating with the fundamental law applicable, negative entirely the thought that forcible intrusion and physical force are necessary or legal to secure the actual and rightful possession of a home, which is in the actual, peaceable, and exclusive possession of another.

No quarrel is to be had with the authorities cited in the majority opinion. The dispute is over their applications. These authorities do not assert the right of force, instead of the rule of law, to secure the actual possession of a home that is then in the *actual, peaceable and exclusive possession of another*.

The majority opinion, upon the principle that the possession of an employee is the possession of his master, concludes, in legal effect, that the master retains occupancy, and may use physical force to enforce his rights as an occupant. The majority opinion might have cited as more in point the following cases: *Napier v. Spielmann*, 127 App. Div. 567, 111 N. Y. Supp. 983, affirmed in 196 N. Y. 575, 90 N. E. 1162; *Kerrains v. People*, 60 N. Y. 221, 19 Am. Rep. 158; *Haywood v. Miller*, 3 Hill, 90. Even these cases may be distinguished from the case at bar. This is an action under the statutes above quoted for forcible intrusion and for the recovery of treble damages. The purpose of such a statute is to protect the actual, peaceable possession, whether right or wrong, and to prevent parties resorting to physical force from retaining such possession except in a legal way. *Iron Mountain & H. R. Co. v. Johnson*, 119 U. S. 608, 30 L. ed. 504, 7 Sup. Ct. Rep. 339. In such action it is unnecessary to prove title or right of possession. It is sufficient to show that the party was in actual, peaceable possession, and was forcibly ejected. In such case a judgment of recovery is not a bar to proper action to recover the possession. *Waterbury v. Deckelmann*, 50 App. Div. 434, 64 N. Y. Supp. 60; *Compton v. The Chelsea*, 139 N. Y. 538, 34 N. E. 1090; *Riverside Co. v. Townshend*, 120 Ill. 9, 9 N. E. 65; see notes in 32 L.R.A.(N.S.) 51; and 8 L.R.A.(N.S.) 426. The evident purpose of the statute is to preserve the peace by prohibiting those not in the actual peaceable possession of real estate from resorting to physical force, threats, or menacing conduct to gain possession from the party in the actual peaceable possession of property. See note in 32 L.R.A.(N.S.) 51. Even a trespasser may be protected by the statute when his occupancy has ripened into an actual peaceable possession. *Schwinn v. Perkins*, 79 N. J. L. 515, 32 L.R.A. (N.S.) 51, 54, 78 Atl. 19, 21 Ann. Cas. 1223.

The majority opinion wholly fails to distinguish between the right of a person to defend his *actual* possession and to eject intruders or persons interfering with such possession, and the right of a person who is not in the actual possession, although entitled to such possession, to eject by force one who is peaceably and exclusively in such actual possession.

The principle asserted by the majority opinion is fraught with grave

consequences when it recognizes by legal rule, as, in my opinion, it does in this case, the right of might and the rule of force in determining and in securing the possession of the home.

GRACE, J., concurs.

J. O. HORSWILL, Respondent, v. NORTH DAKOTA MUTUAL
FIRE INSURANCE COMPANY OF NORTH DAKOTA, a
Corporation, Appellant.

(178 N. W. 798.)

Appeal and error — insurance — insurer's agent held to have notice of occupation by tenant; vacancy held for jury; what constitutes vacancy; construction of clause avoiding policy for vacancy; sufficiency of proof of loss; waiver of proof of loss; statute as to proof of loss construed; defenses in action on insurance policy not urged in motion for directed verdict cannot be considered on appeal; when insured bound by amount of premium collected; necessity of return of unearned premiums.

1. Plaintiff brought this action upon a policy of fire insurance, in the sum of \$2,000, covering a farm dwelling, which was totally destroyed by fire. The defenses interposed were: (1) That the application states the premises are occupied by the owner, whereas they were in fact occupied by a tenant; (2) that a vacancy occurred in the occupancy of the dwelling; (3) that, subsequent to the issuance of the policy, plaintiff placed additional encumbrances upon the land; (4) failure to make proof of loss; (5) no waiver by failure to return unearned premium and a claim that there is no unearned premium, the rate for occupancy by a tenant being enough higher than the premium, when occupied by the owner, that it equals the alleged unearned premium; (6) errors of law in the instructions given by the court. The action was tried to a jury, and its verdict was in favor of plaintiff. Judgment was entered upon the verdict and appeal therefrom perfected to this court.

2. *Held*, for reasons stated in the opinion, that the judgment should be affirmed.

Opinion filed June 22, 1920.

Appeal from a judgment of the District Court of Hettinger County,
Honorable F. T. Lembke, Judge.

Affirmed.

Winterer, Combs, & Ritchie, for appellant.

Where the plaintiff is bound by the terms of his policy in the event of a loss to furnish the insurer certain proofs of loss, but wholly fails to do so within the time limited by the policy, or at all, he forfeits his right to a recovery under the policy unless the defendant has waived the requirement. *Johnson v. Dakota F. & M. Ins. Co.* 1 N. D. 167, 45 N. W. 799.

The abandonment of a house as an actual place of residence, permanently or temporarily, is a vacancy, removal, or change of occupancy such as is contemplated in the provisions of the policy under discussion. *Cummins v. Agricultural Ins. Co.* 5 Hun, 554; *Bennett v. Agricultural Ins. Co.* 50 Conn. 426.

"Certainly a mere occasional sleeping therein is not enough to constitute of itself occupancy as a dwelling, even though it be by the owner." 19 Cyc. 731, ¶ D, and cases cited; *Dohlantry v. Blue Mounds Fire & Lightning Ins. Co.* (Wis.) 53 N. W. 448; *Weidert v. State Ins. Co.* (Or.) 24 Pac. 242.

Occupancy implies the actual use of a dwelling house as a dwelling place, and the insurer has a right, by the terms of such a policy, to the care and supervision which would be involved in such an occupancy. *Bonefente v. Ins. Co.* (Mich.) 43 N. W. 683; *Limburg v. German Ins. Co.* (Iowa) 57 N. W. 626; *Herman v. Ins. Co.* 81 N. Y. 184, 85 N. Y. 163; *Cook v. Ins. Co.* 70 Mo. 610; *Insurance Co. v. Cherry*, 84 Va. 72, 3 S. E. 876; *Ins. Co. v. Kyle* (Ind.) 24 N. E. 727; *Ins. Co. v. Padfield*, 78 Ill. 169; *Ashworth v. Ins. Co.* 112 Mass. 422; *Insurance Co. v. Wells*, 42 Ohio St. 519; *Sleeper v. Ins. Co.* 56 N. H. 401; *Moore v. Ins. Co.* 64 N. H. 140; *Fesche v. Ins. Co.* 74 Iowa, 676, 39 N. W. 87.

Murray & Jacobsen, for respondent.

The sufficiency of the evidence to support the verdict cannot be assailed for the first time in the supreme court, but this question must first be raised in some appropriate manner in the trial court. The appropriate manner is either a motion for a directed verdict or a motion for a new trial. *Buchenen v. Occident Elevator Co.* 33 N. D. 346; *Morris v. Mpls. St. P. & S. Ste. M. R. Co.* 32 N. D. 366.

Where a motion for a nonsuit or a directed verdict is made, the appellant court will consider only the grounds urged in the trial court,

as appellant will not be permitted to change theirs or to add others in the supreme court. *Erickson v. Wiper*, 33 N. D. 225; *Null v. Chicago, B. & Q. R. Co.* (Neb.) 168 N. W. 32; *Reed v. Boland* (S. D.) 140 N. W. 694; *Minder & J. Land Co. v. Brustuen* (S. D.) 140 N. W. 251; *Nichols & S. Co. v. Marshall* (S. D.) 132 N. W. 791; *Black Hills Brewing Co. v. Middle West Fire Ins. Co.* 140 N. W. 690; *Kolka v. Jones* (N. D.) 71 N. W. 559; *Howie v. Bratrud* (S. D.) 86 N. W. 747; *Hanson v. Lindstrom* (N. D.) 108 N. W. 799.

The agent of the company knew that the insured was not occupying the premises in person, but was occupying them by a tenant, and that the premises would be so occupied during the life of the policy. This was to the knowledge of the company, and it is now estopped to take advantage of the provision of the policy and the statement in the application that the premises should be occupied by the owner. *Leisen v. St. Paul F. & M. Ins. Co.* 20 N. D. 316; *Schwinderman v. Eastern Casualty Co.* 38 N. D. 584; *Stotlar v. German Alliance Ins. Co.* 23 N. D. 346; *East Side Trust & Sav. Bank v. McGinnis* (Mich.) 163 N. W. 951; *French v. State Farmers Mut. Hail Ins. Co.* (N. D.) 151 N. W. 7; *Dodge v. Grain Shippers' Mut. Fire Ins. Assn.* (Iowa) 157 N. W. 955; *Anderson v. Wilson* (Iowa) 136 N. W. 374.

A mere temporary absence of the occupants with the intention of returning, when the premises are left in their usual condition, does not amount to a vacancy. *Kampen v. Farmers Mut. F. Ins. Co.* 133 Minn. 163; *Soubert v. Fidelity Phenix Ins. Co.* (S. D.) 136 N. W. 103; *State v. Root* (Wis.) 54 N. W. 35.

By retaining the premium after acquiring knowledge of the facts it now sets up as a defense, the defendant is estopped now to set up such a defense. *Yusko v. Middlewest Fire Ins. Co.* (N. D.) 166 N. W. 539; *Collins v. Iowa Mfrs. Ins. Co.* (Iowa) 169 N. W. 199.

The testimony concerning the conversation between the defendant agent and insured at the time a policy was issued was clearly competent and material. *Leisen v. St. Paul F. & M. Ins. Co.* supra.

GRACE. J. This action is one to recover upon a policy of fire insurance upon a dwelling house, which was totally destroyed by fire, and which prior thereto was located upon plaintiff's farm. The policy is the standard form in use in this state. The complaint properly

states a cause of action upon it, and the answer, in addition to a general denial, sets forth several defenses based upon certain terms of the policy, to which reference will be subsequently made.

The facts are short and simple. The policy in question was issued on the 9th day of July, 1916, in the sum of \$2,000, on a certain two-story shingled roof frame building, owned by plaintiff, and situated on northwest quarter of section 30, township 135, range 94. It was written for a three-year period, and was effective from the 9th day of July, 1916, until noon the 9th day of July, 1919. The amount of premium was \$30, which was paid. It was a renewal policy, the dwelling having been theretofore insured by the defendant. The application for the previous insurance was executed in 1913, and the inference is that the previous insurance was for three years. No new application was signed at the time the present policy was issued. No objection is made to the consideration of this application in connection with the renewal policy, and it is not necessary to state what would be our conclusion in that regard if such objection had been made. On December 13, 1918, the house was entirely destroyed by fire. Immediately after the fire the plaintiff notified defendant of the loss. He wrote to it at four different times, in each letter calling attention to the loss under the policy. The defendant apparently paid no attention to these letters and sent no blanks upon which defendant might make proof of loss. Some time after plaintiff had written the last letter, an adjuster by the name of Velzey came to Regent and had a talk with plaintiff with reference to the loss. The adjuster inquired from plaintiff if he had a total loss and was answered in the affirmative. He afterwards went out and examined the loss and reported to plaintiff, in effect, that it was a total loss, saying, in answer to plaintiff's question: "Is it a total loss or not," "All there is is ashes." The plaintiff never made any report or proof of loss other than the notices above mentioned.

Defendant seeks to avoid liability on the policy mainly for the following reasons:

- (1) That the application states the premises are occupied by the owner, whereas they were, in fact, occupied by a tenant.
- (2) That a vacancy occurred in the occupancy of the dwelling.
- (3) That subsequent to the issuance of the policy plaintiff placed additional encumbrances upon the land.



(4) Failure to make proof of loss.

(5) No waiver by a failure to return unearned premium, and a claim that there is no unearned premium, the rate for occupancy by a tenant being enough higher than the premium when occupied by the owner that it equals the alleged unearned premium.

(6) Errors of law in the instructions given by the court.

With reference to the question of occupancy, it may be said that, while it is true the application states that it is occupied by the owner, there is competent evidence which clearly shows that at the time the application was taken for the insurance the plaintiff had a talk with defendant's agent, who took the application, with reference to the occupancy of the land by plaintiff or by his tenant. Plaintiff's testimony is to the effect that the agent asked him if there was a tenant living there, and that he told him there was, and that he told him, further, that he (plaintiff) was living in Regent, and he said that was all right, and that he (plaintiff) told him "that he never would live in it himself, that he knew of at that time." The plaintiff has had a tenant thereon ever since he made application for and took out the insurance, and had one thereon at the time of the fire, whose name is Frank Busholl, who rented and took possession of the farm in the month of October, 1918. We are of the opinion that there is conclusive proof that the agent of defendant had full knowledge and notice of the fact that the place would be occupied by a tenant during the time the policy was in effect; that the act of the agent in taking the application for the insurance being one which he was authorized to do, and which was within his authority, that the principal must also be deemed to have knowledge and notice. The agent, at the time, knew of the tenancy, and knew that the dwelling would be occupied by a tenant, and not by the owner, and he should have so stated those facts in the application, and, not having done so, we think the defendant is estopped to urge the occupancy of the tenant to avoid the policy. This principle is upheld in the case of *Leisen v. St. Paul F. & M. Ins. Co.* 20 N. D. 316, 30 L.R.A. (N.S.) 539, 127 N. W. 837; *Schwindermann v. Great Eastern Casualty Co.* 38 N. D. 584-590, 165 N. W. 982; *Comp. Laws* 1913, § 6350; *French v. State Farmers' Mut. Hail Ins. Co.* 29 N. D. 426, L.R.A. 1915D, 766, 151 N. W. 7.

Vacancy is another defense relied upon by the defendant to avoid its

liability under the policy. This question, we believe, is one for the jury. By a verdict in plaintiff's favor it has, in effect, found there was no vacancy. After Busholl entered the land and took possession, he moved in some furniture, among other things, a stove, beds, chairs, tables, dishes, clothes, etc. He was a bachelor. One Sagmiller and wife, in the latter part of 1918, also stayed at the house with him for a period of four weeks while he and they were working upon the farm. Two days prior to the time of the fire Busholl slept in the house. At that time there was a bed, bedclothes, spring, and mattress there. He slept on the premises all the time after he rented it, except the nights he slept at Sagmiller's. It appears, also, from the testimony that he and Sagmiller were working together at Sagmiller's coal mine for the purpose of getting out their coal for the winter, and during that time the plaintiff stayed at Sagmiller's place. Two or three days before the fire he went over to the dwelling house in question for the purpose of making room to hold the coal for the winter. As near as may be gathered from the testimony, his absence was a mere temporary one, and he intended to return to the dwelling, and this though he had moved part of the furniture out of the house. There are many reasons why he may have moved out part of the furniture temporarily. He may have desired and needed to have used it temporarily elsewhere. The fact that he went over to see about fixing room for the coal shows that he intended to return, and his testimony is to the effect that his intent was to return. Other circumstances would also show this, as he had rented the land for the following year and intended to and did crop it. We further think there is a failure on part of the defendant to show vacancy, as the moving out of part of the furniture, or even all of it, is not sufficient of itself to show a vacancy or abandonment of the dwelling entirely. There is no showing but what Busholl had stock, machinery, and all of the other things necessary to farm the premises, on the place. Neither is there any showing to the effect that the owner did not have other furniture at the premises. A clause in the policy which provides that it shall become void if a vacancy occurs in the manner therein stated must be strictly construed. The policy provided if the dwelling became vacant for a period of ten days this would avoid the policy. As above stated, the question of vacancy was a question of

fact for the jury, and it has decided against the contention of the defendant, and we think there is substantial evidence to sustain it.

Another defense is that there was no proof of loss. Certainly there was sufficient notice of loss. Plaintiff repeatedly sent written notice to defendant of the loss. Section 6545, Comp. Laws 1913, so far as applicable to this case, in effect provides: Upon notice of a loss being given to the insurer on behalf of the insured, the insurer shall, within twenty days after such receipt of such notice, furnish to the insured a blank form of proof of loss. The insured shall have sixty days after such blank form is furnished in which to make such proof of loss. If the insurer shall fail to furnish such blank form of proof of loss, he is deemed to have waived such proof, and any agreement made to waive the provisions of this section is void.

The evidence fails to disclose that such blanks were furnished the plaintiff, and we think the company has waived any right of defense for failure to make proof of loss. It is also clear in this case that a proof of loss would have availed nothing. The plaintiff had notice of the loss,—this, it must admit,—and the loss was a total one, and the only thing that could be stated in the proof of loss, were it made, was that the loss was the amount of the policy, \$2,000. We think, also, the defendant having neglected or refused to answer plaintiff's notice of loss, or to give the matter any proper attention, together with the failure to furnish blanks, operated as a waiver of proof of loss. The agent of defendant finally came out to the place, and knew of his own knowledge that the loss was total, and his knowledge was the knowledge of the company.

Section 6624, Comp. Laws 1913, provides: "Whenever any policy of insurance shall be written to insure any real property in this state against loss by fire, and that property insured shall be destroyed without fraud on the part of the insured or his assigns, the stated amount of the insurance written in such policy shall be taken conclusively to be the true value of the property insured." It is clear in this case that the loss was total. Under that section the amount of the loss is the face of the policy. The defendant had notice of the loss and knew that it was total. Its agent ascertained that the loss was total. A proof of loss could have given no greater information, nor could it have changed the amount of the loss. That section also makes it unneces-

sary, where the loss is total, to produce any evidence of the value of the building insured. The value thereof in such case is determined by the amount written in the policy, and, except for fraud, that amount is conclusive. The defendant could have ascertained the value before issuing its policy. If it did not do so, it should have. As it has failed to do so, and there is no fraud, it is bound by the amount for which the buildings are insured. It is not claimed in this case there is any fraud, and the record discloses none. The plaintiff did introduce competent testimony showing the value of the dwelling to be \$3,800, but this was entirely unnecessary, and, in this case, entirely superfluous.

As to the defense that subsequent to the issuance of the policy the plaintiff placed additional encumbrances upon it, we are convinced the defendant cannot, at this time, rely upon and claim anything by reason thereof. At the close of plaintiff's case, and again at the close of the entire case, the defendant made a motion for a directed verdict, basing such motion upon two grounds, *viz.*, (1) That the premises were vacant; (2) that there was no proof of loss. The ground of placing encumbrances upon the property subsequent to the issuance of the policy was not included as one of the grounds for a directed verdict. The rule would seem to be that where a motion for a nonsuit or a directed verdict is made, the appellate court will consider the grounds urged in the trial court, and none other, and that on appeal the appellant will not be permitted to change the grounds relied upon in the motion or add others to it in the appellate court. *First Nat. Bank v. Laughlin*, 4 N. D. 391, 61 N. W. 473; *Erickson v. Wiper*, 33 N. D. 225, 157 N. W. 592, and cases and authorities cited therein. We think this disposes of appellant's contention in this regard. However, in this case it does appear from the evidence of plaintiff, in effect, that at the time the application was taken the plaintiff told the agent of defendant that the premises were encumbered, and that he, being in business, that it was likely he would place other encumbrances upon the land. Assuming this to be true, we think that the defendant would be deemed to have knowledge of such encumbrances or intended encumbrances at the time the application was taken. If this is true, we doubt if the defendant could avoid liability on the policy unless it could show a positive increase of risk. However, as we view the matter, a decision of this question is not necessary to a decision of this case; for, as above in-

licated, we think on this appeal defendant is restricted to the matters stated in its motion for a directed verdict.

Adverting to the matter of unearned premium, we think that the premium paid must be taken as the proper premium for the policy issued in this case, even if it is a premium such as should have been paid where the premises are occupied by the owner, and not a tenant. Defendant had knowledge that the premises were occupied and would be occupied by a tenant. The plaintiff had a right to rely upon the amount of premium paid as being the proper premium in amount. The defendant, having knowledge of the true status at the time of the application and the issuing of the policy, is bound by the amount of the premium charged, even if it be somewhat smaller than should have been charged, where the premium charged was not intended to be discriminatory, but, if wrong at all, was wrong as the result of a mistake on its part. There is no claim in this case that the premium charged was intended to be a discriminatory one, and it is held that it was not so intended. In these circumstances, there was clearly some unearned premium; that is, the amount which would be left unearned of the premium from the date of the fire to the expiration of the policy. The defendant made no offer to return the unearned premium, and we are of the opinion that it cannot retain it and still deny liability on the policy. *Yusko v. Middlewest F. Ins. Co.* 39 N. D. 66, 166 N. W. 539.

While the instructions of law given by the court are not, perhaps, model in every respect, they having been given orally, and hence perhaps were not as clear a statement of the law on the subject-matter involved in the action as would have been given by the learned trial court if it had first reduced the instructions to writing and then have given them, nevertheless, we are convinced there is no prejudicial reversible error therein. We think, taken as a whole, they fairly state the law of the case and contain no reversible error.

We have examined all the errors assigned by defendant, and find none which would require and for which it would be proper to reverse the judgment appealed from. We think the judgment should be affirmed. It is affirmed.

The respondent is entitled to his costs and disbursements on appeal.

BRONSON and ROBINSON, JJ., concur.

CHRISTIANSON, Ch. J. (dissenting). In this state the form of a fire insurance policy is prescribed by statute. Section 6625, Comp. Laws 1913, provides that "no fire insurance company, corporation or association, their officers or agents, shall make, issue, use, or deliver for use any insurance policy or renewal of any fire insurance policy on property in this state other than such as shall conform in all particulars as to . . . context, provisions, agreements and conditions with the printed form of contract or policy heretofore filed in the office of the commissioner of insurance as a standard policy for this state. . . ." The insurance policy in controversy conformed to the contract so prescribed. It contained the following provisions: "This entire policy shall be void . . . if a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days." The undisputed evidence in this case is to the effect that the plaintiff on September 3, 1918, leased the premises in controversy to a man named Busholl. The only occupancy of the premises by anyone subsequent to that date was by Busholl. If the premises were occupied at the time of the fire, it was by Busholl and no one else. Busholl testified that shortly after making the contract he moved on the land and took along with him some clothes, a bed, a table, a stove, and some chairs. He went to work plowing and seeding rye. He was assisted in this work by one Sagmiller. After the rye was seeded, he not only left the place, but moved out all of his belongings. A reasonable inference from the testimony is that he moved out sometime in October. The fire did not occur until December 13th. Busholl, however, testified that after he moved away he came back and slept in the house two nights,—the first night about four weeks, and the second night two days, before the fire occurred. I will let Busholl tell his own story with reference to his occupancy of the premises.

Direct Examination.

Q. Did you lose any stuff in the fire there?

A. No.

Q. Any of your stuff burn up?

A. No.

45 N. D.—39.



Q. Your bed?

A. No.

Q. That was out already?

A. Yes, sir.

Cross-Examination.

Q. How many days did you sleep in the house before the two days before the fire?

A. I slept one night two days before the house burned down.

Q. When was the next time before that that you slept in the house?

A. I was there four weeks before.

Q. You moved to Sagmiller's?

A. Yes, sir.

Q. You took your furniture and bedding over to Sagmiller's?

A. Yes, sir.

Q. Then you went over to work in a coal mine?

A. Working and digging my own coal.

Q. But after you finished plowing and sowing the rye you were there one night?

A. One night until two days before the house burned down.

Q. You had taken out all you stuff, so that you did not lose anything?

A. No.

Q. You had taken your bedding, clothes, and everything away, had you not?

A. Yes, sir.

Q. You did not lose anything in the fire?

A. No.

Q. You were not on the place except that one night at any time from the time you finished sowing the rye until that one night you testified to, two days before the fire?

A. Yes, sir.

Q. You moved all your goods and belongings out of the house, did you not?

A. Yes, sir.

Q. You stayed away from the time you finished sowing the rye, and were there only one night between that time and the night of the fire?

A. Yes, sir.

On his redirect examination he testified that he intended to come back to the premises after he got through working at the mine; also that there was a bed, spring, and mattress and bedclothes in the house the night that he claims to have slept there two days before the fire. From this testimony, therefore, it appears that Busholl moved away from the premises when he was through seeding rye; that he also removed all of his belongings, including the stove, and had no property whatever in the house at the time the fire occurred. It also appears that after he had gone over to Sagmiller's to work in the coal mine he came back and slept in the house one night four weeks before the fire occurred, and again one night two days before the fire occurred.

The defendant called as a witness one Gertz, who lived about three quarters of a mile from the building at the time of the fire. Gertz testified that he got his mail almost daily from the mail box at the cross-roads near the building; that this was so close to the building that he could, and did, see the building and premises every day during the months preceding the fire. He further testified:

"During October, November, and December, 1918, I was down to the building during all these months almost daily for my mail. I came and sometimes waited for the mailman, and if it was cold I would stand out of the wind. I could see into the rooms through the windows of the house, and I looked in it. The premises were not occupied by anybody during the months of November and December, 1918. There were no bedclothes, stoves, dishes, or anything of that character in there."

This testimony was corroborated by three of Gertz's neighbors. They all testified that during November and December they saw no lights at night, no smoke from the chimney, no stock on the premises, and in fact no evidence whatever of occupancy. The only evidence adduced by the plaintiff on the question of vacancy and nonoccupancy was the testimony of Busholl, which has already been noted. And, according to his testimony, he had moved away from the premises at least a month before the fire occurred.

The majority opinion is predicated upon the theory that the pro-

vision in the policy was one against "vacancy" alone. It will be noted, however, that the provision covers both "vacancy" and "nonoccupancy." it says: "This entire policy shall be void if a building herein described be or become *vacant or unoccupied* and so remain for ten days." "Vacant" and "unoccupied" are by no means synonymous. "Vacancy" has been said to have the signification of "uninhabited" and to be non-occupancy "for any purpose." *Dohlantry v. Blue Mounds Fire & Lightning Ins. Co.* 83 Wis. 181, 53 N. W. 448; *Pabst Brewing Co. v. Union Ins. Co.* 63 Mo. App. 663. "Occupancy" of a dwelling has been defined to be "the living in" a house. *Hoover v. Mercantile Town Mut. Ins. Co.* 93 Mo. App. 111, 69 S. W. 42; *Stoltenberg v. Continental Ins. Co.* 106 Iowa, 565, 68 Am. St. Rep. 323, 76 N. W. 835.

Cyc. says: "As in general, the term 'vacant' means empty of everything, while 'unoccupied' means that no actual use is being made of the premises, by anyone corporally present or in possession, a condition against nonoccupancy is much more easily broken than is a condition against vacancy. Historically it appears that the insurer has gradually increased the severity of such provisions. Originally the insurer relied upon an alleged implied agreement that the premises insured should remain in the same condition as when the policy was issued; then, upon the theory that a description *in presenti* should be construed as a promissory warranty. It was next asserted that vacancy was prohibited under a clause of the policy providing that the contract should be void in case the risk was increased; then 'vacancy' was expressly prohibited in terms of various character. Next the word 'unoccupied' was linked to the term 'vacant' as denoting a state prohibited; and finally the modern and the standard policy provides that the contract of insurance shall terminate if the building insured shall 'become vacant or unoccupied.'" 19 Cyc. 729.

Cyc. further says: "A mere occasional sleeping therein is not enough to constitute of itself occupancy as a dwelling, even though it be by the owner." 19 Cyc. 731.

The court, in its instructions to the jury, said: "If you find that the tenant vacated the premises with the intention of vacating it permanently or for a period of more than ten days, and that that he thereafter acted upon his intention and did vacate, then you will find for the defendant. If, on the other hand, you find that he did not intend

to vacate the premises permanently, but that his intentions were to only absent himself temporarily and later to return, then you may find for the plaintiff in this case."

This instruction is, apparently, predicated upon the same erroneous theory as the majority opinion; *viz.*, that the provision in question covered "vacancy" alone. The instruction in effect denied to the plaintiff the benefit of the provision against "nonoccupancy." It is difficult to see where there was any room for the inference that the premises were "occupied" after Busholl left and took all his effects out of the house. But in any view of the case the defendant was at least entitled to have the question of "occupancy" submitted to the jury.

BIRDZELL, J., concurs.

J. W. BULL, Plaintiff and Respondent, v. W. L. SMITH, M. H. Smith, P. D. Smith, G. J. Keenan, Ruth A. Keenan, W. J. Goldie, and Harry O'Neill, Defendants, W. L. SMITH and P. D. Smith, Appellants.

(178 N. W. 426.)

Mortgages — payment of amount due by purchaser of land subject to mortgage constitutes discharge.

1. Where one who has purchased land subject to and with knowledge of certain encumbrances against it (the amount of which is in effect deducted from the purchase price), pays the amount due upon and procures an assignment of one of such mortgages, the mortgage is discharged.

New trial — in trial by court insufficiency of evidence not ground.

2. Insufficiency of the evidence does not constitute a ground for a new trial in an action properly triable, and tried, to the court without a jury under § 7846, Comp. Laws 1913.

New trial — diligence must be shown to obtain newly discovered evidence.

3. For reasons stated in the opinion it is *held* that a motion for a new trial on the ground of newly discovered evidence was properly denied.

Opinion filed June 21, 1919. Rehearing denied July 18, 1919.

Appeal from the District Court of Burleigh County, *Nuessle, J.*
Defendants W. L. Smith and P. D. Smith appeal.

Affirmed.

E. T. Burke and *W. L. Smith*, for appellants.

If a plaintiff seeks to come into court upon inconsistent claims, he is required to elect upon which he will stand before proceeding to trial. Bliss, Code Pl. 3d ed. § 164.

An action which proceeds on the theory that title to property remains in plaintiff is inconsistent with one which proceeds upon the theory that title has passed to the defendant. 15 Cyc. 257, and cases cited; *Roney v. Halverson*, 29 N. D. 13, 149 N. W. 688; *Bank v. Young* (Iowa) 140 N. W. 376; *Anderson v. Chilson* (S. D.) 65 N. W. 435; *Mores v. Wormington*, 8 N. D. 329, 79 N. W. 441; *Milling & Elevator Co. v. Railway Co* (Iowa) 66 N. W. 1059; *Seeley v. Seeley* (Iowa) 105 N. W. 380.

Oral evidence cannot be used to vary the terms of a written instrument as applied to the facts of this case. *Bernardy v. C. & U. S. Mtg. Co.* 20 S. D. 193, 105 N. W. 737; *Speer v. Phillips* (S. D.) 123 N. W. 722; *Rooney v. Koenig* (Minn.) 83 N. W. 399; *Radke v. Rothchild Water Co.* (Wis.) 148 N. W. 866; *Barnes v. Hill City Lumber Co.* (S. D.) 147 N. W. 775; *Carper v. Ridpath* (Iowa) 149 N. W. 841; *Solomon v. Stewart* (Minn.) 151 N. W. 716; *Harney v. Wirtz*, 30 N. D. 292, 31 N. D. 430.

Fraud cannot be presumed, but must be proved by clear, convincing, and satisfactory evidence. *Kvello v. Taylor*, 5 N. D. 76, 63 N. W. 889; *Graham v. Graham* (Mich.) 151 N. W. 596.

Unless plaintiff shows that such agreement, if any is proved, was made for his special benefit, he cannot recover thereon. *Fry v. Alsman* (S. D.) 135 N. W. 708; *Kee v. Davison*, 73 Cal. 522, 15 Pac. 100; *Biddell v. Brizolara*, 64 Cal. 354, 30 Pac. 609; *Parlin v. Hall*, 2 N. D. 473, 52 N. W. 405.

The question of merger is purely one of intention, and the holder of the lesser estate may prevent the merger if to his interests to do so. *Machine Co. v. Rice* (Wis.) 139 N. W. 445; *May v. Cummings*, 21 N. D. 287, 130 N. W. 828; *Mendelsson v. Christie* (Neb.) 74 N. W. 1096; *Stastny v. Pease* (Iowa) 100 N. W. 482.

Theodore Koffel, for respondent.

Parol evidence is admissible to show the true consideration of the deed. *Logan v. Miller*, 76 N. W. 1005; *Sommers v. Wagner*, 21 N. D. 531, 131 N. W. 797; *Desmond v. McNamara*, 82 N. W. 701; *Langan v. Iverson*, 80 N. W. 1051; *Keith v. Briggs*, 20 N. W. 91; *Colman v. Post*, 82 Am. Dec. 49; *Swafford v. Whipple*, 54 Am. Dec. 498; *Shehy v. Cunningham*, 25 L.R.A.(N.S.) 1194, and note p. 1202; *Devlin, Deeds*, §§ 822, 1054, 1066, 1069.

The statement of facts showing fraud is a sufficient allegation of fraud. *Martson v. Dresen*, 45 N. W. 110; *Sleep v. Heymann*, 16 N. W. 17.

A mortgage can also be extinguished by merger. *Dembitz, Land Titles*, 766; *Fowler, F. & Co. v. Smith*, 5 L.R.A. 721 and note; *Pugh v. Sample*, 39 L.R.A.(N.S.) 834 and note.

A mortgage is extinguished by the acquirement by the mortgagee of the mortgaged property, and hence such mortgage is no defense to the lien of a junior mortgage. *Murphy v. T. & I. & S. Co.* 33 La. Ann. 454, 39 L.R.A.(N.S.) 437; 16 L.R.A.(N.S.) 470; *McCordia v. Billings*, 10 N. D. 373, 87 N. W. 1008; *Iowa Invest. Co. v. Shepard*, 8 N. D. 332, 66 N. W. 451; *Hebden v. Bina*, 17 N. D. 235, 116 N. W. 85.

CHRISTIANSON, Ch. J. In October, 1909, the defendant J. G. Keenan purchased the premises involved in this action. As purchase price, Keenan and his wife gave their note for \$570 secured by mortgage upon the premises, and assumed the then existing encumbrances, which consisted of two mortgages,—one for \$1,000 and one for \$150. The \$150 mortgage was payable in five annual instalments of \$30 each. On May 6, 1910, the defendant Keenan sold the premises to the defendant W. L. Smith, for the alleged consideration, as expressed in the deed, “of 1 and other valuable consideration.” It is undisputed that Smith paid Keenan \$50, and that this was the only consideration which actually passed between them at the time of the transfer. Keenan, however, contends, and upon the trial he testified, that as a further consideration Smith assumed and agreed to pay the three mortgages against the land. Smith, on the other hand, denied this, and claimed that the \$50 paid

was the only consideration which he agreed to pay. The deed contained no assumption clause, but did state that there were outstanding three mortgages aggregating \$1,720. The defendant W. L. Smith subsequently paid the interest on the first mortgage and taxes on the land. He also paid two of the instalments of the \$150 mortgage, leaving only \$90 of that unpaid. On July 10, 1912, he received an assignment of the \$150 mortgage, and paid the then holder \$90 therefor. The assignment was received with the name of the assignee blank, and the name of M. H. Smith was inserted therein as assignee. In November, 1912, M. H. Smith executed a power of attorney, authorizing W. L. Smith to foreclose the mortgage. The mortgage was thereupon foreclosed by advertisement. The notice of foreclosure stated that \$486.50 was due upon the mortgage. On December 30, 1912, the premises were sold to the defendant M. H. Smith, under such foreclosure proceeding for the amount claimed due and costs of foreclosure. She subsequently assigned the foreclosure certificate to the defendant Goldie, to whom a sheriff's deed was issued March 11, 1914. On April 20, 1914, Goldie conveyed the land to the defendant P. D. Smith by quitclaim deed. Thereafter, and during the pendency of this action, P. D. Smith conveyed by quitclaim deed to the defendant J. B. Smith.

The plaintiff purchased the \$570 note and mortgage, which was executed by the defendants Keenan, and is the owner and holder thereof. He brought this action to foreclose such mortgage. He also asked for personal judgment against the defendant W. L. Smith, on the ground that, as a part of the consideration for the deed which Smith received from Keenan, he (Smith) agreed to pay the indebtedness secured by the mortgage. The defendants Smith appeared and answered. They averred that plaintiff's mortgage had been extinguished by the foreclosure of the prior mortgage, and that the defendant J. B. Smith was the owner of the premises. The trial court found that the assignment of the mortgage was really taken to and for the benefit of W. L. Smith, and that such mortgage was in effect paid by him, and hence that the foreclosure proceedings and the sheriff's deed issued thereon were null and void. The trial court also found that W. L. Smith had agreed to pay for such mortgage as a part consideration of the deed which he received from Keenan. The defendants W. L. Smith and P. D. Smith

thereupon moved for a new trial. The motion was denied, and they have appealed from the judgment and from the order denying a new trial.

It is undisputed that the defendant W. L. Smith paid interest on the first mortgage, taxes on the land, and two instalments on the \$150 mortgage, and only \$90 was paid to the holder of that mortgage at the time the assignment thereof was made. W. L. Smith, however, asserts that he paid such interest, taxes, and instalments with the understanding between himself and the holder of the first two mortgages that he (Smith) should be subrogated to the rights of the holder of such mortgages. It is undisputed that the defendant W. L. Smith negotiated for and made all arrangements for the purchase of the \$150 mortgage, but he asserts that he did this for his wife, and that he purchased it for her. Mrs. Smith did not furnish the money, but the defendants testified that W. L. Smith was indebted to his wife, and that she gave him credit upon such indebtedness for the amount which Smith paid for such mortgage, and also for the amounts he had paid out for interest and taxes upon the land.

The facts in the case speak for themselves. The contention of the defendant W. L. Smith, that he obtained or retained any lien upon the land for the taxes and interest payments, is, in our opinion, so obviously without merit as to require no extended discussion. See, however, *Morrison v. Morrison*, 38 Iowa, 73; *Hardin v. Clark*, 32 S. C. 480, 11 S. E. 304; *Stevens v. Church*, 41 Conn. 369; *Russell v. Pistor*, 7 N. Y. 171, 57 Am. Dec. 509; *Lovelace v. Webb*, 62 Ala. 271; *Sletten v. First Nat. Bank*, 37 N. D. 47, 163 N. W. 534. A careful consideration of the evidence leads us to the conclusion that the trial court was right in holding that the assignment of the \$150 mortgage was in fact taken for the benefit of W. L. Smith, and that he did, in legal effect, pay and discharge such mortgage. Leaving wholly on one side whether W. L. Smith assumed and agreed to pay the mortgages, it is undisputed that he had actual knowledge of and purchased the land subject thereto. The amount of such liens was stated in the deed which he received and considered by the parties in fixing the purchase price. Under any theory, Smith agreed to pay \$50 over and above the amount due on the three mortgages. This principle has been held applicable even to the purchaser at a judicial sale. Thus, in *Sletten v. Bank*, *supra*, this court

held that where the holder of two mortgages covering the same tract of land forecloses the junior mortgage and purchases the land at the foreclosure sale, the debt secured by the senior mortgage is in effect paid and the mortgage discharged. Of course the true status of the matter is not changed, or the result affected, by the fact that the assignment was taken in the name of M. H. Smith. *Franklin v. Wohler*, 15 N. D. 613, 109 N. W. 56.

Did the defendant W. L. Smith assume and agree to pay the mortgages? The positive testimony of Keenan is to the effect that he did. The trial court believed this testimony to be true, and found accordingly. There is nothing in the record before us to justify us in saying that the finding is not in accord with the preponderance of the evidence.

Nor do we believe that the court erred in denying the motion for a new trial. Both appellants asked for a new trial on the ground of insufficiency of the evidence. So far as P. D. Smith is concerned this is the principal ground. Under the plain words of the statute, insufficiency of the evidence does not constitute a ground for a new trial in actions tried under § 7846, Comp. Laws 1913.

The defendant W. L. Smith also asked for a new trial of the question whether he assumed and agreed to pay the mortgages, on the ground of newly discovered evidence. Under the statute a new trial may be granted on the ground of "newly discovered evidence material to the party making the application, which he could not, with due diligence, have discovered and produced at the trial." (Comp. Laws 1913, subd. 4, § 7660.) The proposed newly discovered evidence in this case is the testimony of one Olson, who claims to have been present at the time Smith purchased the land from Keenan. Olson is a resident of Bismarck, where the defendant resides and the action was tried. The defendant does not claim that the evidence could not have been discovered and produced upon the trial. On the contrary he in effect admits that he could and would have discovered and produced the evidence upon the trial if he had known that the question of his personal liability was involved. But he says that "he did not know that there was any such issue in said case." It is difficult to understand how there can be any basis for this contention. The complaint in the case expressly averred that the defendant W. L. Smith, as a part of the consideration for the deed which he received from Keenan, promised and

agreed with Keenan that he (Smith) would pay the three mortgages, and in the prayer for relief personal judgment was demanded against the defendant Smith accordingly. In his answer the defendant specifically denied that he agreed to pay the mortgages, and averred that the only consideration agreed upon between himself and Keenan was \$50, and that the defendant paid said sum. Upon the trial, considerable time was devoted to the introduction of evidence upon the issue thus framed. Manifestly, upon this record, defendant is not entitled to a new trial upon the ground of newly discovered evidence.

It follows from what has been said that the judgment and order appealed from must be affirmed. It is so ordered.

ROBINSON, BRONSON, and BIRDZELL, JJ., concur.

GRACE, J. I concur in the result.

JOHN F. KANABLE, Appellant, v. GREAT NORTHERN RAILWAY COMPANY, Respondent.

(178 N. W. 999.)

Limitations of actions — amendment in action under Federal Employers' Liability Act properly denied.

1. Except in actions which are duly prosecuted under the Employers' Liability Acts, and within the time limits of those acts, "an employer is not bound to indemnify his employee for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed, nor in consequence of the negligence of another person employed by the same employer in the same general business." Comp. Laws, § 6107.

Appeal and error — no appeal from denial of new trial, unless statement is settled and made a part of the record.

2. A motion for a new trial must specify the grounds of the motion, and, when it is made on the minutes of the court, the moving party cannot successfully appeal from an order denying the motion, without first causing a statement of the case to be settled and made a part of the record so the appellate court may examine and consider "the minutes of the court."

Opinion filed June 7, 1920. Rehearing denied September 4, 1920.

Appeal from the District Court of Cass County, Honorable *M. J. Englert*, Judge.

From an order denying motion for new trial, defendant appeals. Affirmed.

M. A. Hildreth, for appellant.

There was but one cause of action, and that was for the tort or wrong. *Friedrickson v. Renard*, 247 U. S. 207-213; *Nash v. Myls*. St. L. R. Co. (Minn.) 169 N. W. 540; *Tudor v. Oregon Short Line R. Co.* (Minn.) 155 N. W. 200.

"An amendment to the effect that plaintiff sues as personal representative on the same cause of action under the Federal statute, instead of as sole beneficiary of the deceased under the state statute, is not equivalent to the commencement of a new action, and is not subject to the Statute of Limitations." *Union P. R. Co. v. Wyler*, 158 U. S. 285, distinguished; *Washington R. & Electric Co. v. Scala*, 244 U. S. 630; *Texas & P. R. Co. v. Cox*, 145 U. S. 593.

Plaintiff is not prejudiced because he predicated his cause of action under the Employers Liability Act. *Harrill v. Davis*, 168 Fed. 187, 27 L.R.A.(N.S.) 1153, and note; *Clark v. Heath*, 3 L.R.A.(N.S.) 145 and note; See notes under the head of Pleading & Practice in *Seaboard Air Line R. Co. v. Horton*, and citation authorities in L.R.A.1915C, 79-81; *Wabash R. Co. v. Hayes*, 234 U. S. 86; *Bravis v. C. M. & St. P. R. Co.* 217 Fed. 234; *Fernette v. Pierre Marquette R. Co.* 141 N. W. 1084, 144 N. W. 834; *Pelton v. Illinois C. R. Co.* 150 N. W. 236; see also extensive note in 47 L.R.A.(N.S.) 79, 80, 81.

Murphy & Toner, for respondent.

The specification of errors required to be served with notice of appeal under § 4 of chapter 131 need not be served in cases where reversal is asked upon some ground other than error of law occurring on the trial. *Leu v. Montgomery*, 31 N. D. 1, 148 N. W. 662; *Wilson v. Kryger*, 29 N. D. 29, 149 N. W. 721.

Trial court had no jurisdiction to grant new trial upon the application made. A new trial can be granted upon certain statutory grounds only. *Comp. Laws*, § 7660.

Theory of case below controls in this court, and appellant is estopped to question legality of procedure consented to by him. "He who consents to an act is not wronged by it." *Comp. Laws*, § 7249.

"Acquiescence in error takes away the right of objecting to it." Comp. Laws § 7250; *Lindeberg v. Barton* (N. D.) 117 N. W. 616.

"Acquiescence in error takes away the right of objecting to it. And where a party consents to a certain procedure, and stipulates that certain evidence may be admitted, he is estopped from asserting in the appellate court that the procedure was erroneous and the evidence inadmissible." *Walton v. Olson* (N. D.) 170 N. W. 107; *Vannett v. Co.* (N. D.) 173 N. W. 466.

Where plaintiff predicates his right of recovery upon a specific law, he cannot recover unless the evidence establishes a state of facts arising under that law. *Moliter v. Ry. Co.* 168 S. W. 250; *Creteau v. Ry. Co.* 129 N. W. 855; *Lauer v. Ry. Co.* 145 Pac. 606; *McAdow v. Ry. Co.* 164 S. W. 188; *L. & N. Ry. Co. v. Strange*, 161 S. W. 239; *South Covington R. Co. v. Finan*, 155 S. W. 742; *Anbruster v. Ry. Co.* 147 N. W. 337.

Under §§ 7482 and 7483, Comp. Laws, the granting of such an amendment was in the sound discretion of the trial court, and there was no abuse of that discretion under the facts as disclosed by the record. *Kurtz v. Paulson*, 33 N. D. 400, 157 N. W. 305; *Ennis v. Ins. Co.* 33 N. D. 20, 156 N. W. 234.

ROBINSON, J. This is an appeal from an order denying a motion for a new trial. This is a personal injury suit to recover \$10,000 under the Federal Employers' Liability Act, which is the same as the State Employers' Liability Act. Under either act the action must be commenced within two years.

The complaint avers that in June, 1917, at Fargo, North Dakota, the plaintiff and other employees of the defendant undertook to load a heavy gravestone onto a car of defendant; that the stone was to be shipped from Fargo to some point in Montana, and in loading the stone the defendant, by its servants, so negligently used a freight truck that the plaintiff was thrown with great force against the side of the freight car, breaking the drum of his right ear and crushing the joint of his large toe on the right foot, to his damage, \$10,000. On petition of the defendant the case was transferred to the Federal court, and on motion of the plaintiff it was remanded to the state court. In February, 1920, more than two and one half years after the injury, the case was tried and

the jury found a general verdict for defendant, and found specially that the shipment of the stone was from Fargo to Walhalla, North Dakota. In March, 1920, the plaintiff made a motion for a new trial and for leave to strike from his complaint the averments relating to interstate commerce and the Federal Employers' Liability Act. The motion was denied. It was made on the complaint, the answer, the special findings and verdict, the charge of the court, and the minutes of the court. The motion for a new trial was not made for either of the several causes specified by statute. § 7660. It did not specify any ground or cause whatever. Nor was it accompanied by a statement of the errors of which plaintiff complained. The statute provides:

"A party desiring to make a motion for new trial . . . shall serve with the notice of motion a concise statement of the errors of law he complains of, and if he claims the evidence is insufficient to support the verdict or that the evidence is of that character that the verdict should be set aside as a matter of discretion, he shall so specify." Comp. Laws 1913, § 7656.

The rule is that "grounds not stated in the motion or written statement will not be considered at the hearing by the trial court. And similarly it is held that on appeal the reviewing court will not consider any grounds other than those specified in the motion. A party making a motion for new trial is bound by the reasons assigned therein and can urge no other on appeal." 20 Cyc. 944. However, the most fatal defect is that the plaintiff has not caused a statement of the case to be settled. The record is here without anything purporting to be a statement of the case. As there is no evidence before the court, it is in no position to review the evidence and declare that in denying the motion there was any abuse of discretion. The presumptions are all in favor of the judgment and the order.

On a proper notice a motion for a new trial may be made for either of the several causes specified by statute, and it may be made on a statement of the case or on the minutes of the court. The minutes contain the evidence, the objections and exceptions, and all the procedure from the commencement to the end of the trial. The district judge may take official notice of his minutes, and may refresh his memory by hearing the stenographer read the same to him; but on appeal the minutes can

not be considered unless they are copied, certified, and made a part of the record. As provided by statute.

"In case a motion for a new trial is made on the minutes of the court, either party desiring a review of the decision of the court on such motion may proceed to have settled a statement of the case." Comp. Laws 1913, § 7664.

It now seems quite certain that the action should have been brought in the state court under the Fellow Servant and Contributory Negligence Acts of 1907 and the Act of 1915, chap. 207. In actions to recover for personal injuries under those acts, the fact that the employee has been guilty of contributory negligence is not a bar to recovery, but the damages are diminished in proportion to the negligence attributable to the employee. Under the first statute the action must be commenced within one year, and under the second statute, two years. The short-time limit for commencing actions against common carriers by railways for personal injuries is based on good reasons. The persons who witness such injuries and accidents are commonly transients, who go and come, and forget all about matters which do not concern them. Hence, it is in furtherance of justice that such actions should be commenced and brought to trial while the facts are fresh in the memory of disinterested witnesses. But the purpose of plaintiff's motion is, in effect, that now, after the lapse of three years, he be permitted to commence and maintain such an action. Were the motion granted, the amendments allowed, and a trial had on new pleadings,—the plaintiff first paying the costs of this action,—it would be virtually the same as the commencement of a new action without any showing that it would be in furtherance of justice.

CHRISTIANSON, Ch. J., and BIRDZELL, J., concur.

BRONSON, J. I concur in the result.

GRACE, J. (dissenting.) Section 7607, Comp. Laws 1913, provides: "A trial is the judicial examination of the issues between the parties, whether they are issues of law or of fact." Section 7608, so far as material to this case, provides: "An issue of law must be tried by the court or by the judge. An issue of fact in an action for the recovery of

money only or of specific real or personal property must be tried by a jury, unless a jury is waived, as provided in § 7637, or a reference is ordered, as provided in §§ 7645 and 7646."

That part of the trial court's instructions which is most material for our consideration reads thus: "Your first duty will be to determine from the evidence in this case as to whether or not the plaintiff was engaged in handling freight destined to another state. If the plaintiff, when the accident occurred, was employed in the handling of shipments of freight that were to pass out of the state of North Dakota and enter another state, then he was employed in interstate commerce, and the consequent rights and liabilities arose under the Federal Employers' Liability Act. If, on the other hand, you should find that the freight or shipment he was handling at the time of the accident or injury was destined to some point within the state of North Dakota, then it would not come within the Federal Employers' Liability Act, and the plaintiff would not be entitled to recover in this case. *This is the first question for you to determine.* Should you find that the shipment of freight which the plaintiff was handling at the time of the accident or injury was destined to some point within the state of North Dakota, then it would be your duty to render a verdict in favor of the defendant, *and you need not go any further.* Should you, on the other hand, find from the evidence in this case that the freight the plaintiff was handling at the time the injury occurred was destined to some point in another state beyond the state of North Dakota, *then you would proceed to take up the question of negligence.*"

It is presumed that the jury followed the instructions of law, as given it by the court, and in this case it conclusively appears that those instructions were implicitly followed by the jury. If this is true, and we think it is, there never has been a trial upon the real issues of fact in this case. There has never been a trial upon plaintiff's real cause of action,—that wrong which was done him by the negligence of the defendant. That, and that alone, is the cause of action in this case. It is the only cause of action. Whether the plaintiff was injured while engaged in interstate or intrastate commerce are solely questions relating to the remedy, and not to the cause of action. Whether the plaintiff was pursuing a proper remedy was a question of law for the court to decide, and not a question of fact for the jury. If the court were satisfied from the

evidence that the commerce engaged in at the time of the injury was not interstate in character, it should have so decided, so that the questions of fact involved in the case, including defendant's negligence and the damages sustained by plaintiff by reason of the injury, might have been determined, which, of course, has not been done. It was not necessary for the plaintiff to plead the law of this state applicable to the situation, in order to derive the benefit thereof. All that was necessary upon his part was to plead and prove facts entitling him to recover, and the law of the state becomes immediately applicable without the pleading of it.

The plaintiff's application and motion in this case, while in the nature of a motion for a new trial, was not, in fact, such. It was really an application to have the merits of the case determined in the first instance, or for the first time, and not for a new trial. In other words, it merely called the attention of the court to a duty which it should have performed in the course of the trial, that is, to eliminate the question of interstate commerce; for the evidence must have shown beyond any doubt that the act performed by plaintiff was one of intrastate commerce. This was clearly shown by the bill of lading or the history of the shipment. There could be no dispute upon this point, because defendant's records must have shown that the gravestone was billed to be shipped from Fargo to Walhalla, North Dakota. Under the instruction given by the court, the question of plaintiff's injuries, the damages he suffered thereby, the negligence of the defendant, or any other question of fact, never reached the jury in this case. The court precluded that, for the plain meaning of the instruction of the court is not difficult to discern. The plain meaning of that instruction is that the jury were required, first, to find whether the act which plaintiff was doing when injured was intrastate commerce, or, conversely stated, was not interstate commerce. This was the first question to be determined by the jury under the instruction given it by the court. They were instructed, in effect, that if they found the act to be one of intrastate commerce they need not go any further and should return a verdict in favor of the defendant. The jury did find the act to be one of intrastate commerce. It did this by answering the special questions submitted to it. That was the first question it determined, and it did not go any further. Therefore, any other question never reached the jury, and there was no trial upon the real issues of fact in the case.

There was no trial upon the wrong which was done plaintiff; there was no trial upon the amount of damages he sustained, nor upon the negligence of defendant, for it must be kept strictly in mind that the court told the jury, in effect, that if it found that the freight which the plaintiff was handling at the time of the injury was destined to some point in another state beyond the state of North Dakota, then it could proceed to take up the question of negligence. It is clear that no question, excepting the one single question relating to the remedy, was passed upon by the jury,—and upon this it had no right or authority to pass. Further reasoning would be superfluous for the purpose of demonstrating or making clear this point. The general verdict returned in favor of the defendant did not decide any issues of this case, nor any of the facts of this case, excepting that the defendant at the time of the injury was engaged in intrastate commerce, and this was not a question of fact for the jury, but of law for the court. The general verdict in this case in no way strengthens the position of defendant. There was, in fact, no trial under the section of law as above set forth.

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FRANK WEHSNER, Administrator of the Estate of Reinhold Renke,
Deceased, Respondent, v. KANSAS CITY LIFE INSURANCE
COMPANY, a Corporation, Appellant.

(178 N. W. 970.)

**Insurance — evidence held not to show payment of delinquent premium —
waiver of conditions as to reinstatement held not shown.**

In an action on an insurance policy which had lapsed for nonpayment of a premium prior to the death of the insured, it is *held*, for reasons stated in the opinion, that the evidence is insufficient to establish payment of the delinquent premium and further insufficient to establish a waiver of the conditions of the policy regarding reinstatement.

Opinion filed June 26, 1920. Rehearing denied September 4, 1920.

Appeal from the District Court of Hettinger County, *Lembke, J.*
Reversed and dismissed.

V. H. Crane, and Miller, Zuger, & Tillotson (George W. Kingsley,
of counsel), for appellant.

A directed verdict should be given when the prima facie case has been completely destroyed by unimpeached and uncontradicted documentary evidence. *Kazee v. Kansas City L. Ins. Co.* 217 S. W. 341; *Automobile Co. v. St. Louis Union*, 187 S. W. 109; *Darlington Lumber Co. v. Missouri P. R. Co.* 243 Mo. 224, 147 S. W. 1052.

Soliciting or collecting agents have no authority to vary or modify contracts of insurance, to waive conditions thereof, or to extend time for the payment of premiums, other than the first premium. *Fidelity Mut. L. Ins. Co. v. Bussell*, 75 Ark. 25, 86 S. W. 814; *Russell v. Prudential Ins. Co.* 176 N. Y. 178, 68 N. E. 252; *Bryan v. National L. Ins. Co.* 21 R. I. 149, 42 Atl. 513; *German American Ins. Co. v. Humphrey*, 62 Ark. 348, 35 S. W. 428; *New York L. Ins. Co. v. O'Dom*, 100 Miss. 219, 56 So. 379; *Phipps v. Union Mut. Ins. Co. (Okla.)* 150 Pac. 1083; *Cayford v. Metropolitan L. Ins. Co. (Cal.)* 91 Pac. 266; *Iowa L. Ins. Co. v. Lewis*, 187 U. S. 335, 23 Sup. Ct.

Rep. 126; *Madsen v. Maryland Casualty Co.* (Cal.) 142 Pac. 51, Ann. Cas. 1913A 851, note.

A soliciting agent has no power or authority to waive any of the provisions of a policy contract, after the same has been executed, delivered, and put in full force and effect. *Phipps v. Union Mut. Ins. Co.* (Okla.) 150 Pac. 1083; *Madsen v. Maryland Casualty Co.* (Cal.) 142 Pac. 51, and cases cited.

Jacobsen & Murray, for respondent.

Life insurance policy providing for annual payment of premium and for forfeiture of policy upon nonpayment thereof is not a contract in force for a single year with the privilege of renewal from year to year, but a contract for the entire life of the insured, subject to forfeiture by failure to pay the annual premium when due. *Hall v. Dakota Mut. L. Ins. Co.* (S. D.) 158 N. W. 449; *Noem v. Equitable L. Ins. Co.* (S. D.) 157 N. W. 308; *McDonald v. Equitable L. Ins. Soc.* (Iowa) 169 N. W. 352.

"Payment of premium to insurer's authorized agent is payment to insurer. *West v. National Casualty Co.* (Ind.) 112 N. E. 115; *Public Sav. Co. v. Manning* (Ind.) 111 N. E. 945; *Leison v. St. Paul F. & M. Ins. Co.* 20 N. D. 317.

BIRDZELL, J. This is an appeal from a judgment in favor of the plaintiff and from an order denying the defendant's motion for judgment non obstante or for a new trial. The action is brought by the administrator of the estate of Reinhold Renke to recover upon an insurance policy issued to him during his lifetime. The beneficiary is Karolina Renke, wife of the insured. She died November 5, 1918, and the insured two days later. The defense is that the policy had lapsed before the death of the insured.

It seems that in May, 1917, Reinhold Renke applied, through one Wilhelm, a soliciting agent, for insurance in the defendant company. The policy was issued on May 17, 1917, and the premiums are due annually after that date, with the usual provision for thirty days' grace without interest. At the time the policy was issued, Renke gave to Wilhelm his note for \$78.30, the amount of the first premium, due on

November 1, 1917. This note did not become the property of the insurance company, but was used by Wilhelm as collateral for a loan secured by him from the Williams agency, of Mitchell, South Dakota. The Williams agency was the general agent of the defendant company, with authority to transact its insurance business as an agent in North and South Dakota and Minnesota. The net amount of the first premium, exclusive of commission, was remitted to the defendant company through this agency. About September 19, 1918, Wilhelm, Welch, who was then employed by the Williams agency, and one Lindsey, called on Renke for the purpose, as they say, of collecting this premium note. At that time the second premium was also long past due and the policy had lapsed for nonpayment according to its own provisions. After some talk with Wilhelm and Welch, Renke gave a postdated check for \$84.74. This check is dated October 5, 1918, and the amount of it exactly corresponds with the amount that was due on the first premium note at the date of the check.

In the original complaint drafted by the plaintiff's attorney the giving of this first premium note was alleged, as well as its payment on or about the 25th day of September, 1918. It was further pleaded that at the time of the payment of this note Welch and Wilhelm extended the time of payment of the second premium to May 17, 1919, the alleged consideration for the extension being the payment of the note for the first premium. Waiver of a doctor's certificate as a condition of reinstatement is also pleaded. An amended complaint, however, was later filed, in which it was alleged that the first premium was paid. All statements respecting the giving of the note for the first premium were omitted, and it was alleged that the payment made in September, 1918, by the postdated check was payment of the second premium. Waiver of reinstatement conditions is alleged substantially the same as before.

The contentions of the parties upon these facts are: The appellant contends that the policy had lapsed; that the payment made by the insured was only the payment of the first premium with interest; that there had been no payment of the second premium; that no reinstatement had been effected; and that there had been no waiver on the part

of the insurance company of the provisions of the policy regarding reinstatement. The contentions of the respondent, on the other hand, are that there is sufficient evidence in the record to warrant the jury in finding that the second premium was paid by the postdated check, and that at the time of its payment the insured was reinstated, the agents waiving the conditions of the policy respecting the doctor's certificate.

The defendant's witnesses, particularly Wilhelm and Welch, identify the note which was the occasion for the call upon Renke in September, 1918, as being the note given for the first premium, and some of the testimony concerning the conversation with Renke regarding the payment of the note went in without objection. On the other hand, a careful reading of the record fails to disclose any evidence to support the allegations in the amended complaint that the postdated check was given for the second premium. It does not correspond in amount with the second premium; but, as previously stated, it does exactly correspond with the amount due on the first premium note at the date of the check. Respondent's counsel likewise has been apparently unable to point out any evidence in support of the allegations in the amended complaint regarding the payment of the second premium.

In addition to the depositions given by the officers of the company to the effect that the second premium had not been paid, the following testimony shows how conclusively the check given by Renke was identified as having been given in payment of the first premium note: (It will be noted, too, in this connection that in so far as the testimony related to a transaction with the deceased the ruling of the trial court was favorable to the plaintiff. But the testimony went in without objection.)

Welch testified, without objection on this ground, that he was superintendent of agents for the J. E. Williams agency; that in September, 1918, J. E. Williams, of the Williams agency, turned over to him a number of notes for collections; that among them was the note which Renke had given to Wilhelm and which Wilhelm had put up as col-

lateral with the Williams agency. The testimony of which relating directly to the vital transaction is:

Q. What date was it, Mr. Welch, that you called on Mr. Reinhold Renke in company with Mr. Wilhelm and Mr. Lindsey with reference to his note?

A. September 19th or 20th.

Q. Did you see Mr. Renke on that date?

A. Yes, sir.

Q. Did you have any talk with him?

Mr. Murray: The plaintiff objects on the ground that it appears that the witness is an agent of the defendant company, and the question calls for a conversation with Reinhold Renke, who is now deceased, and the testimony is therefore inadmissible under subdivision 2, § 7871, Comp. Laws 1913.

The Court: Objection sustained.

After a brief cross-examination the court sustained the objection to the testimony relating to transactions with the deceased. The testimony continues:

Mr. Murray: I will withdraw the objection.

Q. I will ask you, Mr. Renke (meaning Mr. Welch) what your mission was at the time you called on Mr. Renke?

A. I called on him for the purpose of collecting a note I had of Mr. Renke.

Q. Do you remember the facts of the note as to its date and amount?

A. The note, as I recall it, was dated the forepart of May, 1917, was due, I think, November 1, 1917, and the amount was \$78.30.

Mr. Murray: We object to that as not the best evidence.

Q. State what you said to Mr. Renke and what Mr. Renke said to you?

A. I told him that I had the note for collection.

Q. I will ask you to state what Mr. Renke said to you after you told him what you were there for?

A. He said that he was unable to pay the note at that time; that he

was threshing and as soon as he marketed his crop he would be in shape to pay the note.

Q. What did you say?

A. I suggested that he give me a postdated check for the amount of the note to save me making the trip back, as I had a good many notes to collect. He agreed to it.

Q. Pursuant to that conversation did Mr. Renke give you a check?

A. Yes, sir.

Q. I show you exhibit, marked for identification "plaintiff's exhibit B;" I will ask you to state whether or not that is the check that Mr. Renke gave you in payment of the note?

A. (Witness examines paper) It is, yes, sir.

Q. What did you do with the check?

A. I took the check to the Farmers State Bank of Bentley, with two or three other checks I had, and they cashed the checks and gave me a draft.

Q. What did you do with the note?

A. I turned it over to Mr. Renke.

Q. Who was present at the time this conversation took place?

A. Mr. Lindsey and Mr. Wilhelm.

Q. In that conversation did Mr. Renke tell you what the note you had in your possession and were trying to collect was given for?

A. I do not recall that he did.

Q. Do you know what the note was given for?

Mr. Murray: Objected to as calling for a conclusion; no foundation laid. No showing that this witness solicited the insurance. On the further ground that it is hearsay.

The Court: Objection overruled.

A. This note was given in payment of the first premium on his policy. In collecting it I told him that I was collecting the note for the first premium.

Q. To whom was the note payable?

A. Constantine Wilhelm.

Q. What interest did it bear?

A. Six per cent from date.

Q. Why did you date the check October 15th, when you were there on the 15th of September, 1918?

Mr. Murray: Objected to.

The Court: Objection overruled.

A. I asked Mr. Renke when he thought he would have the money; that is, the date he figured he would have it, so I dated the check accordingly.

The respondent, however, relies upon certain testimony as establishing a waiver of the usual reinstatement requirements. The witness Adam Kelsch, testifying concerning statements made by Wilhelm to one Krouse, stated that Wilhelm asked Krouse to take out a policy and told him that "Renke had just fixed up so that if he died to-morrow he would get \$2,000." Krouse corroborated this statement. Aside from any question as to the binding force of this admission upon the defendant company, we are of the opinion that the evidence is insufficient to establish either the payment of the second premium, a waiver, or a reinstatement. We think it clearly established by this record that the only premium ever paid by the insured was the first annual premium, and that this was paid after the policy had lapsed; also that the evidence is insufficient to support any finding to the contrary. He had, of course, received consideration in the insurance had for the year plus the period of grace that the policy was in full force. It is not shown that the agents had any authority to extend the payment of the second premium for a year or for any other period, and this is contrary to the express provisions of the policy.

There being no evidence of the payment of the second premium, of a reinstatement effected in the manner called for by the policy, or of a waiver of compliance with the reinstatement conditions, the trial court should have granted the defendant's motion for an instructed verdict. The judgment appealed from is reversed and the case dismissed.

CHRISTIANSON, Ch. J., and ROBINSON, J., concur.

GRACE, J. (dissenting). This is an appeal from a judgment in favor

of the plaintiff, and from an order denying defendant's motion for judgment non obstante, and for a new trial.

Reinhold Renke, the insured, died, and the action is brought by the administrator of his estate, to recover upon an insurance policy in the sum of \$2,000. The beneficiary, Karolina Renke, was the wife of the insured, and she died shortly prior to his death. The insured left six children ranging in age from four to fourteen years.

The defendant interposed a defense that the policy had lapsed prior to the death of the insured. The issues, as framed, were tried to a jury, and a verdict returned in favor of plaintiff.

At the time plaintiff took out the policy of insurance, he gave a promissory note to the agent of the plaintiff, one Wilhelm, for the amount thereof, which note has at all times remained his, and has never become the property of the insurance company.

The policy was issued May 17th, and a premium of \$78.30 was settled for, by plaintiff giving his note for that amount, due November 1, 1917.

The Williams agency of Mitchell, South Dakota, was the general agent of the insurance company in North and South Dakota and Minnesota, with authority to transact its insurance business as an agent therein.

Wilhelm borrowed money on the note given for the premium, from the Williams agency. The plaintiff paid to the insurance company \$87.74 by a check which was made payable to George Welch, and indorsed by him, as such, to the company, and bore date October 5, 1918, and it is claimed by the plaintiff to be in payment of the second premium; that it was received, as such, by the agent, and it in fact speaks for itself; it needs no explanation. What is written thereon is not to be disputed. It was made payable to Welch, the agent of the Kansas City Life Insurance Company. The defendant received the full amount thereof. It had no claim against plaintiff, other than the second premium, as it never owned the first premium note.

The defendant had witnesses to show the surrounding circumstances of the execution and delivery of this check. Plaintiff objected to all this, and objected to the witnesses testifying, by reason of the provisions of § 7871, Comp. Laws 1913, which, so far as material here,

provides: "Any civil action or proceeding by or against executors, administrators, heirs at law, or next of kin, in which judgment may be rendered, or order entered, for or against them, neither party shall be allowed to testify against the other, as to any transaction whatever, with, or statement by, the testator or intestate, unless called to testify thereto, by the opposite party; *and where a corporation is a party in proceedings mentioned in this section, no agent, stockholder, officer or manager of such corporation shall be permitted to testify to any transaction had with the testator or intestate.*"

The defendant's witnesses were Welch, Williams, Wilhelm and Lindsey. With the exception of the latter, they were the agents of the defendant. There is no dispute upon this point: Lindsey was not an agent of the defendant, but his testimony is without any real probative force. He did not hear all the conversation, and his testimony, as a whole, was as favorable to the plaintiff as to the defendant.

Objection was seasonably interposed to the reception of the evidence given by the agents of the defendant, and to their competency as witnesses. It was the duty of the court, under the statute, to prohibit such witnesses from testifying.

It will be noticed that the statute prohibits the agent, stockholder, officer, or manager of the corporation from testifying to any transaction had with the testator or intestate.

The statute does not say their evidence, upon objection thereto, shall be inadmissible or incompetent, so that, if not objected to, it might be admissible and thus be permitted to go into the record, but it plainly says they shall not testify.

This provision in § 7871, Comp. Laws 1913, is an amendment of § 7253, Laws 1905. The latter section contains no provision or prohibition, with reference to agents of corporations, as is contained in the former section.

Section 7253 was amended by chapter 119, Laws of 1907, so as to include the prohibition we are discussing. It was evidently thought that the statute, prior to its amendment, was broad enough to include the prohibition; but, in the case of *First Nat. Bank v. Warner*, 17 N. D. 81, 114 N. W. 1085, 17 Ann. Cas. 213, this court construed § 7253,

Laws 1905. The decision was written by Chief Justice Morgan, and it was there held that the prohibition of the statute covered only the evidence of parties to actions or proceedings, but did not include the agents of the parties.

This case was followed in another decision subsequently written, also, by Chief Justice Morgan,—the case of *Cardiff v. Marquis*, 17 N. D. 117, 114 N. W. 1088. These decisions, without doubt, were what moved the legislature to amend § 7253, Laws 1905, by the enactment of chapter 119, Laws of 1907, which is § 7871, Comp. Laws 1913, so as to prohibit the agents, etc., of corporations from testifying to transactions with deceased.

If the agents of the defendant in this case had been prohibited, by the court, from testifying, as they should have been, and as the statute plainly says they shall be, there would nothing remain of the defense interposed. It was the plain and manifest duty of the trial court to enforce § 7871; it is also the manifest duty of this court to do likewise. For the statute is one which is grounded upon public policy.

The majority decision in this case, in effect, abrogates the statute, turns aside the will and purpose of the legislature, as expressed in that statute, and in effect, if not directly, holds that the agents, stockholders, etc., of corporations may testify, in regard to transactions with deceased.

We are convinced that great harm will result from this decision, and from the erroneous interpretation of the statute. The statute is plain and cannot be misunderstood; it means what it says. The true interpretation of that statute is contained in the decision in *Williams v. Clark*, 42 N. D. 107, 172 N. W. 826. It is true that the majority of the court concurred only with the conclusions of the writer there, who was the same as the writer of this dissenting opinion; but, as the competency of the witnesses was one of the principal questions in that case, the reasoning there, which holds that such statute prohibits those from testifying, mentioned in it, became the law of that case; and it is a correct interpretation of the statute under consideration.

The plaintiff here objected to the competency of the witnesses. One objection was sufficient. It is not claimed that plaintiff did not make a proper or sufficient objection to such witnesses testifying. If the plaintiff were an appellant, his objections, if they had been overruled,

would have been sufficient upon which to base assignments of error; but, as we view the matter, even if there had been no objection on the part of the plaintiff to the competency of the witnesses, it would have been the duty of the court, under the statute, as their disqualification under the statute appeared, to have prohibited them from testifying.

If, as in effect it is held in the majority opinion, the agent, stockholder, or manager of the corporation may testify, and be a competent witness in this case, then under that theory, and under the effect of the holding in the majority opinion, they may testify to a transaction with the deceased; and that conclusion is diametrically opposed to the plain words of the statute under consideration.

Section 7871 was also recently construed in the case of *Druey v. Baldwin*, 41 N. D. 473, 172 N. W. 664, 182 N. W. 700. In that case, incompetent witnesses sought to give testimony, and this court in that case used the following language:

"Objection was likewise made by the appellant to the competency of the witnesses to so testify, under the provisions of the section quoted (§ 7871). This testimony substantially covers the direct testimony in the record, of delivery or nondelivery of the deed in question by the deceased to the appellant.

"We are clearly of the opinion that the objection so made to the competency of these witnesses to so testify was good, and that the testimony in question was inadmissible."

It is clear to my mind that the decision in that case, and in the *Williams-Clark Case*, constitutes a correct interpretation of the statute involved, and that the holding of the majority opinion in the case at bar is erroneous. It is also clear to my mind, that there is sufficient evidence to sustain the verdict, and that the judgment and order appealed from should be affirmed.

BRONSON, J. I dissent. The record in this case is not free from doubt. The majority opinion has concluded, as a matter of law, that the record clearly discloses that only the first annual premium was ever paid by the insured, and that this was paid after the policy had lapsed; that the record does not disclose that the agents had any authority to extend the payment of the second premium, contrary to the express pro-

visions of the policy. Upon the issues, the material questions involved were the payment and acceptance of the second annual premium and the continuance of the policy in force, through waiver of the defendant, and the action of its agents. If in the record there are disputed questions of fact upon which reasonable men might draw different conclusions, these questions, involving also the credibility of the witnesses, were primarily and fundamentally for the jury. *Akin v. Johnson*, 28 N. D. 205, 148 N. W. 535; *Peterson v. Fargo-Moorhead Street R. Co.* 37 N. D. 440, 164 N. W. 42. As Justice Grace has discussed in his dissenting opinion, considerable incompetent testimony was adduced concerning transactions with the deceased. In determining as a matter of law that there is no evidence for the jury upon material issues involved, this incompetent testimony cannot properly be considered. The question, therefore, is whether there is any legal evidence in the record upon which the verdict can be supported. *State Bank v. Bismarck Elevator & Invest. Co.* 31 N. D. 102, 153 N. W. 459. There is some evidence in the record to the effect that one Williams was the general agent for the defendant; that one Welch was an employee and agent of this general agent; that one Wilhelm was a soliciting agent of the defendant. The policy issued, concededly, was in force from May 27, 1917, to May 27, 1918. A premium note for \$78.30 had been given in payment of the first premium. It was made payable to Wilhelm. The defendant did not, and does not, claim such note as its property. It represented apparently, in whole or in part, the agent's fee or commission due from the defendants. This note was placed with the general agent, as collateral for a loan. In September, 1918, Welch, the representative of the general agent, Wilhelm, and another party, visited the deceased at his place where he was threshing. At that time the policy of life insurance, by its terms, had lapsed. By its provisions, the failure to pay the premium on or before the date when due, or the failure to pay any premium note when due, rendered the policy null and void, without any action or notice by the company. By its provisions, in case of the default in the payment of any premium or of any premium note when due, the company will reinstate such policy at any time, upon written request by the insured, accompanied by evidence of insurability satisfactory to the company, and of the payment of all premium arrears

and indebtedness existing at the date of default, plus 5 per cent interest. By its terms, no agent had power to modify the contract, to extend the time of payment of premiums, or to waive any forfeiture. The note given for the first premium was dated in May, 1917, and fell due in November, 1917. By the strict terms of the policy, this note, when not paid in November, 1917, rendered the policy null and void. The majority opinion recognizes at least that the policy was in force for a period of one year, plus the period of grace. The defendant does not assert that the policy lapsed before the expiration of a year after its issuance. Apparently there is at least a recognized waiver on the part of the defendant concerning at least one of the strict provisions contained in this contract of insurance issued to the deceased. For, the premium note was a consideration for the policy whether given to the defendant or its agent. When the general agent, through his representative, went to the farm of the deceased to see him about this policy or the premium note given therefor, the conditions in the contract that provided for the immediate forfeiture of the policy upon the failure to pay the premium could be waived by such general agent. *Hall v. Dakota Mut. L. Ins. Co.* 37 S. D. 342, 158 N. W. 449; *Noem v. Equitable L. Ins. Co.* 37 S. D. 176, 157 N. W. 308; *McDonald v. Equitable Life Assur. Soc.* 185 Iowa, 1008, 169 N. W. 352; *New York L. Ins. Co. v. Eggleston*, 96 U. S. 572, 24 L. ed. 841; *Lyke v. First Nat. Life Acci. Ins. Co.* 41 S. D. 527, 171 N. W. 603; *Hartford Life Annuity Ins. Co. v. Unsell*, 144 U. S. 439, 36 L. ed. 496, 12 Sup. Ct. Rep. 671; *Michigan-Idaho Lumber Co. v. Northern F. & M. Ins. Co.* 35 N. D. 244, 160 N. W. 130. It may be that the preponderance of evidence in this case is to the effect that these three persons went out to see the deceased for the sole purpose of collecting the premium note theretofore given by him; that they did not waive any of the provisions of the policy; and did not reinstate the policy of the deceased. There is evidence in the record, however, from the mouths of three witnesses to the effect that Wilhelm, the agent of the defendant, on this farm of the deceased stated that he had settled up with the deceased, and that if he died to-morrow he would get \$2,000. The check issued by the deceased was given to the representative of the general agent, Welch, as agent of the Kansas City Life Insurance Company. It was

indorsed by Welch, as agent of the Kansas City Life Insurance Company. The doubtful circumstance concerning this check is that in amount it equals the first premium note given, plus interest. On the other hand the circumstance is doubtful why such check should be made payable to the agent of the Kansas City Life Insurance Company, when, as the defendant contends, the first premium note was not the property of the defendant and it had no concern with the same. If the mouth of the deceased were not sealed by death, and the mouths of defendant's agents sealed by the statute, these doubtful circumstances might be explained. The defendant's witnesses totally deny making any such statement concerning settlement with the deceased. Upon the record the check given by the deceased was given in payment either of the first premium note, or of the second annual premium. If it was true that the defendant's agents admitted settlement with the deceased and made statements to the effect that the policy was in force (because, assuredly, the \$2,000 would not be payable unless the policy was in force), the check necessarily must have been in payment of the second annual premium. If, on the other hand, no such admission or statements were made, the check undoubtedly was given in payment of the first premium note. These were questions of fact for the jury, concerning which there was a sharp conflict in the evidence. If the second annual premium was paid and accepted, and the policy, without further acts, treated as reinstated by the agents, the defendant, upon principles of waiver and estoppel, may not insist upon the express terms and conditions of the policy concerning reinstatement. The jury, through its findings, has determined that this check was given in payment of the second annual premium. I am not prepared to state, as a matter of law, that this finding should be reversed.

H. F. O'HARE, Respondent, v. BISMARCK BANK, a Corporation,
et al., Appellants.

(178 N. W. 1017.)

Homestead — the "home" and "residence" is the place where a person resides.

1. The "home" and "residence" of a person is the place where he commonly resides; a place to which, when absent, he returns, like a bee to its hive, a carrier pigeon to its home, a bird to its nest.

Homestead — wife's homestead right is not affected by death of husband.

2. From sale on execution the law exempts a homestead—a city lot and the dwelling house in which the owner and head of a family resides. When the wife owns the homestead her title and her exemption right are not affected by the death of her husband. While she continues the head of a family and resides in her home it is exempt.

Homestead — at husband's death wife takes an estate for life or years.

3. When the husband owns a homestead and dies leaving a wife and children, the title does not vest in the wife, but she takes an estate for life or years, as provided by statute.

The law gives it and the court awards it.

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Opinion filed July 3, 1920. Rehearing denied September 4, 1920.

Appeal from the District Court of Burleigh County; Honorable
W. L. Neussle, Judge.

Modified.

Foster & Baker, for appellants.

Even though there was at one time a homestead estate of plaintiff's and respondent's vendor in the real property involved in this action, such estate was lost through abandonment of the premises as a home.

NOTE.—Where a husband and wife occupy a homestead, it was held that she was the head of the family, at his death, as will be seen by an examination of the cases collated in 4 L.R.A.(N.S.) 365, and L.R.A.1917C, 361, on what constitutes a family under homestead and exemption laws.

On homestead rights of nonresident widow, see note in 96 Am. Dec. 412.

As to what constitutes abandonment of homestead, see notes in 102 Am. St. Rep. 388, and 60 Am. Dec. 607.

45 N. D.—41.

Hall v. Holland, 138 Minn. 403, 165 N. W. 233; Clark v. Derroy, 71 Minn. 108, 73 N. W. 639; Wapello Co. v. Brady, 118 Iowa, 482, 92 N. W. 717; Clemans v. Penfield, 111 Iowa, 511, 82 N. W. 947; Blodgett v. Lawrence (Vt.) 97 Atl. 666; Jarvais v. Moe, 38 Wis. 440; Re Phelan, 16 Wis. 79; Davis v. Andrews, 30 Vt. 678.

H. F. O'Hare, for respondent.

A temporary lease of a portion of a homestead premises does not deprive such homestead or any part thereof of its homestead character. Hall v. Holland, 138 Minn. 403, 165 N. W. 235; Re Coles, 224 Fed. 170; Kelcham v. Kelcham, 269 Ill. 587, 109 N. E. 1025; Healy v. Bank, 30 N. D. 628, 153 N. W. 392; Clark v. Bird, 158 Ala. 258, 48 So. 359; Pratt v. Pratt, 161 Mass. 276, 37 N. E. 435; Adams v. Adams, 183 Mo. 396, 82 S. W. 66; Dennis v. Bank, 19 Neb. 675, 28 N. W. 512; McDermott v. Kaman, 72 Wis. 268, 39 N. W. 537; Repenn v. Davis, 72 Iowa, 548, 34 N. W. 326; Boyer v. Dague, 167 Iowa, 212, 149 N. W. 73; Yellow Hair v. Pratt (S. D.) 169 N. W. 515.

ROBINSON, J. The plaintiff brings this action to quiet his title to a house and lot, which is No. 705, Sixth street, Bismarck. In August, 1919, the plaintiff purchased the lot from Ida B. Healy, against whom there were two judgments docketed, a judgment docketed in February, 1904, for \$486.78, on which execution had been issued and levied on the property; a judgment docketed in August, 1911, for \$150.40. The complaint avers that when the judgments were obtained and when the property was conveyed to the plaintiff it was the actual homestead of Ida B. Healy. Defendants appeal from a judgment quieting title.

The case is governed by the statute on homesteads. To the head of a family residing in this state there is exempt from judgments and sale on executions a limited tract of land with the dwelling house in which the homestead claimant resides. Comp. Laws, § 5605. The homestead claimant may file for record with the proper register of deeds a declaration of homestead, which must contain a statement showing the person making it is the *head of a family and that he resides on the premises*. Section 5623. Then it is provided the head of a family may be either the husband or wife and any person who has residing on the premises with him and under his care and maintenance his or her child, a minor brother or sister, a father or mother, and other dependents. Section

Thus it appears the homestead claimant must be the *head of a family and he must have a dwelling house and he must reside in it.*

In 1896 the title to the property in question was in Ida B. Healy. She put a house on it, in which she resided with her husband and children. In 1901 the husband died, and, in time, the children, a son and a daughter, grew up and made their homes in Jamestown. Then Mrs. Healy rented the house to one Staley at \$30 a month. He occupied it for four years. Then she rented it to Taylor, who occupied it for two years; then to Parsons who has occupied it since October 1, 1918. The house consists of six rooms and a bathroom. In renting it Mrs. Healy reserved one small room on the second floor, in which she stored all her household furniture, beds, and bedding. Her claim is that during the renting period she has maintained a residence in the house by making occasional visits to the room reserved and stored with the furniture.

Soon after the first renting of the lot the defendants levied an execution on the same. Then Mrs. Healy commenced an action to restrain the levy and sale, and this court held that the levy should be enjoined during such time as the premises continued to be a homestead. 30 N. D. 629, 153 N. W. 392. In that case it does not appear that any witnesses were sworn other than Mrs. Healy. Her testimony is quoted in the opinion and it covers three pages. It was not contradicted. In this case it is very different. While Mrs. Healy deposes that she has been making monthly trips from Jamestown to Bismarck and living there one or two days at a time in the dismal room filled with furniture, her testimony is highly improbable and it is flatly contradicted. People do not keep up a residence in that way for six, for seven, or eight years. Then there is no claim that the judgments do not represent an honest debt which Mrs. Healy never purposes to pay, and that goes to her credibility. For truth and honesty are kindred virtues. They go together. A person who is not honest, neither is he truthful. Since October 1, 1918, Mrs. Jennie Parsons has occupied the house continuously every day without interruption. She testifies that during that time she has seen Mrs. Healy only twice and that she stayed at the house only half or three quarters of an hour. She says Mrs. Healy could not have lived in the room without her knowing it.

Q. What is the condition of the room?

A. Well, back from the door along the wall was chairs, dressers, commodes, pictures, and those were covered with bed sheets. There was an iron bed made up with clothes spread on it and pillows, and no mattress; and the window was closed, that is, with the furniture. She could not use the window; she could not get to it; there was too much furniture and it was piled up against the window and right in front of it. The room was 8 x 10 or a little larger.

The testimony, the facts and the circumstances show beyond doubt that when the property was sold to the plaintiff in August, 1919, it was not a homestead. Mrs Healy did not reside in the house; she had not resided in it for years; she was not the head of a family. The city of Bismarck was not her postoffice address.

Now the statutes do also provide for a homestead by inheritance, which is entirely different from the homestead in question. Section 5627. "Upon the death of a person in whom the title to real property constituting a homestead is vested, a homestead estate shall survive and descend in the order following: (1) To the surviving husband or wife for life. (2) To the testator's minor child or children until the youngest attains majority. (3) In case of a surviving husband or wife dying before the majority of the youngest child, then to the decedent's minor child or children until the youngest attains majority."

Section 8723. "Upon the death of either husband or wife the survivor, so long as he or she does not again marry, may continue to possess and occupy the whole homestead."

That section refers to the homestead by inheritance. If the title to the property in question had been in the husband at the time of his death then the widow, that is, Mrs. Healy, would have taken an estate for life or so long as she did not again marry, but as such widow she would not have inherited the title. But when, as in this case, the surviving wife is the owner in fee of the homestead, her title and interest is not in any manner affected by the death of her husband. The probate court had no jurisdiction to set off or in any manner interfere with her homestead. She continues to hold the same under § 5605, and not otherwise. Thus it is apparent there are two classes of homesteads, and some courts have fallen into error by failing to note the distinction.

between the title to real property with a homestead exemption, and a homestead by inheritance for a limited time without any fee title.

In *Healy v. Bismarck Bank*, 30 N. D. 628, 153 N. W. 392, ex Chief Justice Bruce cites Comp. Laws, §§ 5627 and 8793, which relate to an inheritance or probate homestead. Then he says: It seems quite clear from those statutes that the homestead laws are made for the protection of the widow, whether she has children to support or not, and she will not lose her interest because her children have grown up or she does not happen to have any (p. 637). And that is true of a homestead *by inheritance or a probate homestead*, but in this case the fact that the plaintiff is a widow has nothing whatever to do with her homestead rights, which is nothing only an exemption from sale on execution. The exemption is a family right rather than a personal right. *First International Bank v. Lee*, 25 N. D. 197, 141 N. W. 716. In *Healy v. Bismarck Bank*, *supra*, page 639, Justice Bruce writes: "There can be no doubt that if the title had been in the husband the interest of the wife would have been protected. "Why," says the supreme court of Kentucky "should not the original owner have a right equal to the survivor, and why should not the law favor the latter equally with the former? Is the party to be worsted because he owns the property?"

Now, so far as such questions apply, it is for the legislature to answer them, and not the courts. When a widow applies to the probate court for an interest in her husband's land she takes just what the statute gives her and no more. But when the widow owns the fee title to a tract of land which she claims as a homestead her claim in no manner depends on her widowhood or the allowance of a probate court. It depends wholly on the statute which defines and limits a homestead right to the *head of a family residing in a dwelling house on the land claimed as a homestead*. Section 5605. Clearly at the time of the conveyance to plaintiff Mrs. Healy did not reside on the property in question and it was not her homestead. It was not exempt from sale on execution. The evidence in the record is sufficient to show an abandonment of the premises as a homestead. Accordingly the judgment should be modified by decreeing a lien in favor of the defendant thereon, for the amount of his judgments.

BRONSON, J. (concurring specially). I am of the opinion that the evidence in the record is sufficient to show an abandonment of the premises as a homestead. Accordingly the judgment should be modified by decreeing a lien in favor of the defendant thereon, for the amount of his judgments.

ROBINSON and BIRDZELL, JJ., concur.

GRACE, J. (dissenting). The facts in this case are stated in the majority opinion, and a restatement thereof is unnecessary. At a time prior to this action, and in another action, the homestead character of the premises in question was determined.

We refer to the case of *Ida B. Healy v. Bismarck Bank*, the latter, there, as here, a defendant. The opinion in the former action was filed June 3, 1915. 30 N. D. 628, 153 N. W. 392. In that decision it was determined, that the premises involved in that action was the homestead of the plaintiff. Those premises are the same as involved in this.

In that action it was determined that the judgment held by the defendant was not a lien upon the premises, and the defendant was enjoined upon issuing execution on the judgment, or judgments, during the time the premises retained their homestead character.

After that decision, nothing further was done by the defendant to enforce or to have the judgments, mentioned in the majority opinion, determined to be a lien upon these premises.

While the premises retained their homestead character, impressed upon them by the former action, and while the injunction above referred to was still in full force and effect, the plaintiff in that case sold these premises, in August, 1919, to this plaintiff, for the sum of \$2,300, and received therefor, in cash, the full purchase price of \$2,300.

Subsequent to the purchase of the premises, the plaintiff brought this action to quiet title. The defendant herein filed a complaint in intervention, setting up the judgments and asserting them as a lien. The evidence in this case is clear, that, at the time of the transfer to the plaintiff, the premises were the homestead of *Ida B. Healy*. The evidence in this respect is of the same character, and equally as convincing and strong, on the part of *Ida B. Healy*, as it was in the former case.

The evidence clearly shows, at the time of the sale, it was her homestead, and further clearly shows that it was her intention to, and she did always, claim it as a home up to the time of the sale.

It will not be necessary to set forth this evidence, but a comparison of the evidence in this case, and the evidence set forth in the former opinion, found in 30 N. D. 628, will leave no doubt as to the correctness of our conclusion.

The homestead character of the property existed at the time of the transfer to the plaintiff, and the judgments at that time were not liens upon this property and were void, so far as being any lien against this property.

Ida B. Healy had a right to sell her homestead, as such, and the proceeds thereof would be exempt, if they were intended to be used, within a reasonable time, for the purchase of another homestead. That question, however, would not arise unless the defendant were maintaining an action to reach the proceeds, and if this were the case, which it is not, a different question might be presented.

Defendant, however, is not seeking to do this, but is asserting that the judgments are a lien, notwithstanding the decision, and notwithstanding the further fact that the premises retained their homestead character at the time of the sale.

We hold that it cannot do this, and further, that the judgments, at the time of this sale, were not a lien upon the premises in question, by reason of their being impressed with the homestead character, and that they were, in fact, void at that time as against this property.

The findings of fact of the trial court were also to this effect, and there is no reason why this court should set aside these findings, and come to a different conclusion. The decision of the trial court was right, is in accord with the evidence, and there is no legal reason why it should not be affirmed.

It is unnecessary for us to state that this court has always given a liberal construction to the homestead and exemption laws, and this, in the interest of public policy, and for the protection of the home and the family. That policy of this court has been consistently pursued ever since statehood, and during territorial days. It is entirely unnecessary to set forth all those decisions, or even to mention them. They are an

open book, wherein is well and correctly written, humane, just, and liberal construction of the homestead laws, and the spirit found in them should be found in this case.

Ida B. Healy was a widow; her children had grown to maturity, and had gone away. It was lonely for her to stay there alone all the time, and, in this regard, we think we can do no better then use the splendid thought of a former chief justice of this court, A. A. Bruce, who was the author of the decision in the former case, and wherein, in this regard, he used the following convincing language:

"The plaintiff never at any time relinquished the control of the house. She merely rented it, month by month. She reserved a room in the house, even though it was occupied, as a whole, by tenants. She was simply doing what nine out of ten widows, whose children have grown up, would do, that is, reserving the central homestead, and the right to return thereto as a shelter against adversity, and as a permanent home, but, relieving the monotony and loneliness of life by visiting her children and friends, as occasion offered. Such acts do not constitute an abandonment of a homestead."

These words correctly express the liberal policy of our homestead laws. They are based upon a broad public policy, and show a proper conception of the basic principles of homestead laws. That construction is broad and liberal, as contra-distinguished from a narrow and selfish view. It takes into consideration the benefits to accrue to the state and the nation, in the protection of the home, which is the unit of the state and nation.

The opinion of the majority, however, in this case, is based upon a narrow and technical construction of the homestead laws, and, as we view it, rests mainly upon that expression in the majority opinion, which is as follows:

"Then there is no claim that the judgments do not represent an honest debt which Mrs. Healy never proposes to pay, and that goes to her credibility. For truth and honesty are kindred virtues. They go together. A person who is not honest, neither is he truthful."

In answer to this, it may be said, that no creditor, no person, is warranted in extending any credit, or lending any money, with the expectation that it will be paid out of the homestead, unless it is, at the

time of the transaction, voluntarily thereon secured by the owner of the homestead, by a mortgage, etc.

A homestead is not property in the sense that, on the strength of it, persons should advance credit or money to the possessor thereof. In such case, the homestead should not be taken into consideration, for it is exempt, and this is known when the credit is extended.

The law provides that a judgment is not a lien upon the homestead; that it is exempted, in order to protect the head of the family and the family. So that if one owns a homestead, and also owes an honest debt, but refuses to pay the debt from any proceeds of the homestead, that is not dishonesty; it is the law. Neither does a refusal to pay such debt out of the homestead, or the proceeds thereof, show that the possessor of the homestead is dishonest and untruthful. In fact, the proceedings in the prior case, as well as this, conclusively show that the owner and possessor of the homestead is both honest and truthful.

The majority opinion entirely fails to take into consideration the broad public policy, which is the basis of every homestead law. It fails to take into consideration the intention of the homestead law, which is the protection of the home, and as such, should, and must, receive a liberal construction in order to effectuate its beneficent purposes.

For one, I shall take no backward step in this regard. I believe the homestead law should be liberally construed to protect the homestead for the owners and occupants thereof against the adversities which may come upon them, and in order that, as the winter of life draws upon them, they may have a place they may call home and which will be free from the claims of creditors.

CHRISTIANSON, Ch. J. (dissenting). By the decision of this court made June 3, 1915, it was adjudged that the property in controversy was the homestead of Ida B. Healy, and that the judgments which the defendants held against her did not constitute a lien or claim upon it. It was further adjudged that defendant be restrained and enjoined from asserting or claiming said judgment to be a lien upon said property, during the time it continued to be a homestead. *Healy v. Bismarck Bank*, 30 N. D. 628, 153 N. W. 392. The plaintiff purchased the

property from said Ida B. Healy in August, 1919. If it was her homestead at the time of the sale, the exempt character ran with the sale. 21 Cyc. 553.

The sole question presented on this appeal is whether interim June, 1915 and August, 1919, said Ida B. Healy abandoned her homestead, and thereby caused the judgments held by the defendants to become liens against the property. Of course, the decision rendered by this court in the former action established that the property was the homestead of Ida B. Healy, and that the judgments which defendants held against her were not liens against it. The presumption is that the condition then shown to exist continued. Comp. Laws 1913, subdv. 32, § 7936, 21 Cyc. 639. The defendants had the burden of overcoming this presumption. And in this action they were, by the express terms of the statute, deemed plaintiffs, for the purposes of the trial. Comp. Laws 1913, § 8153. Hence, the defendants had the burden of showing that the judgments had become and were liens against the property at the time plaintiff purchased it from Ida B. Healy. This action was tried before the same judge who tried the action of Healy v. Bismarck Bank, *supra*. Ida B. Healy appeared in person and testified in this case. She testified positively that she had never abandoned her homestead or her intention to make it her home; that she retained the intention to make it her home at all times until she made the sale. While my mind is not free from doubt I am not prepared to overturn the findings and judgment of the trial court, and order judgment for the defendants.

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ACTION.

1. The ordinary action is commenced when a summons is issued and served upon the defendant. An action is commenced in cases in which attachment is permitted when the summons is duly issued. *Johnson v. Engelhard*, 11.
2. Personal service of a summons can only be made within the state. When it is served without the state, in cases where it is permitted by a statute to be so served, service must be made by publication as provided by law. *Johnson v. Engelhard*, 11.
3. One may not assert and enforce two inconsistent modes of redress, and one may not split up his cause of action so as to compel thereby the obligator of the debt to answer or respond twice for the payment of the same claim. *Miller Co. v. Harvey Merc. Co.* 504.

ANIMALS.

1. In an action to recover damages occasioned by defendant's cattle, horses and swine trespassing upon plaintiff's premises in the fall of 1918 and destroying certain grain in stack, it is held:
The provisions in Sec. 8500, Comp. Laws 1913, to the effect that a party claiming damages under chap. 45 of the Code of Civil Procedure, Comp. Laws 1913, shall bring an action to recover the same within sixty days after the infliction of such damages, has reference to an action wherein the plaintiff has seised, and seeks to impress the claim for damages as a lien against, the offending animals. *Schneider v. Marquart*, 390.
2. Where the offending animals have not been restrained; where no attempt has been or is made by the party injured to obtain the benefit of the lien upon trespassing animals afforded by chapter 45 of the Code of Civil Procedure; and where the lands trespassed upon were not within the limits of a stock district (Comp. Laws 1913, Secs. 2618-2626) an action to recover damages occasioned by trespassing animals is controlled by Sec. 7375 (subd. 3), Comp. Laws 1913, and may be maintained at any time within six years after the cause of action accrued. *Schneider v. Marquart*, 390.

APPEAL AND ERROR.

1. The evidence as to the injury being such that reasonable persons might draw different conclusions therefrom, the verdict of the jury cannot be disturbed. *Larson v. Russell*, 33.
2. In an appeal from an order vacating garnishment proceedings, made upon

APPEAL AND ERROR—continued.

- a motion and order to show cause therefor, the appellant, pursuant to the statutes and the rule of this court, must present a record identifying by the order or certificate of the trial court, the papers or evidence presented or heard upon the hearing. *Solon v. O'Shea*, 362.
3. Where the order granting a new trial recites that it is granted for the reason, among others, that the trial court is "of the opinion . . . that the evidence is insufficient to support the verdict," the supreme court, in reviewing the order, must assume that the trial court, in ruling on the motion for a new trial, determined that the evidence was insufficient, and exercised his discretion in favor of such motion, even though he did not prepare and file a written memorandum stating the grounds on which his ruling was based, as prescribed by Sec. 7945, Comp. Laws 1913. *Kavanaugh v. Nestler*, 376.
 4. When a motion for a new trial embraces the ground that the evidence does not justify the verdict, the motion, upon such ground, is addressed to the sound judicial discretion of the trial court; and the order made thereon, based upon such ground, will not be reversed in this court, unless the record discloses a case of abuse of discretion. This is especially true in cases where a new trial is ordered in the court below. *Kavanaugh v. Nestler*, 376.
 5. It is held that there was no abuse of discretion in ordering a new trial upon the ground of insufficiency of the evidence in this case. *Kavanaugh v. Nestler*, 376.
 6. In certifying a question of law to the supreme court, pursuant to chapter two, Session Laws 1919, the trial court must first exercise its sound judicial discretion in determining that the question of law involved is doubtful, vital, and principally determinative of the issues in the case to the end that causes may not be delayed in final hearing and determination, and that a certified question of law may not be made, when reviewed and determined by the supreme court applicable and determinative upon issues and facts not clearly determined or settled. *Stutsman County v. Dakota Trust Co.* 451.
 7. Under such statute, the supreme court exercises alone its appellate jurisdiction. It may review a certified question of law determined or adjudicated by the trial court. It can neither give an advisory opinion nor try and determine questions of law or of fact as original questions. *Stutsman County v. Dakota Trust Co.* 451.
 8. In certifying a question of law, pursuant to such statute, it is necessary that the trial court determine, settle, adjudicate, and certify to a formulated question of law. This question of law must be clearly stated and not involve questions of fact, or those of mixed law and fact. It must be distinctly stated so that it can be determined by the supreme court without regard to other issues of law or of fact. *Stutsman County v. Dakota Trust Co.* 451.

APPEAL AND ERROR—continued.

9. Where, during the progress of a trial, a question of law arises deemed by counsel and the court to be decisive of the case, and the question is certified to the supreme court, under chapter 2 of the Session Laws of 1919, and the jury discharged, it is held: Following Guilford School Dist. v. Dakota Trust Co. 46 N. D. —, 178 N. W. 727, and Stutsman County v. Dakota Trust Co. ante, 451, 178 N. W. 725, the record presents no question concerning which this court can exercise either its appellate or original jurisdiction. *Clark v. Wildrose Special School Dist.* 497.
10. In a trial de novo in the supreme court, where an action in equity to foreclose a real estate mortgage is made determinative upon the issue of payment and settlement of the debt, and where the record evidence upon such issue is made indefinite and uncertain by reason of newly discovered evidence offered upon motion for a new trial in the trial court, this court, although the trial court has denied the motion for a new trial, may remand, in the interest of substantial justice, the entire case to the district court for purposes of a new trial. *Abdalcader v. Kanan*, 524.
11. The supreme court is not required to render final judgment in all cases wherein a trial de novo is demanded. Where it deems such course necessary to the accomplishment of justice, it will remand the case for a retrial in the district court. *King v. Tallmadge*, 530.
12. For reasons stated in the opinion the instant case is remanded for a new trial in the district court. *King v. Tallmadge*, 530.
13. Plaintiff brought this action upon a policy of fire insurance, in the sum of \$2,000, covering a farm dwelling, which was totally destroyed by fire. The defenses interposed were: (1) That the application states the premises are occupied by the owner, whereas they were in fact occupied by a tenant; (2) that a vacancy occurred in the occupancy of the dwelling; (3) that, subsequent to the issuance of the policy, plaintiff placed additional encumbrances upon the land; (4) failure to make proof of loss; (5) no waiver by failure to return unearned premium and a claim that there is no unearned premium, the rate for occupancy by a tenant being enough higher than the premium, when occupied by the owner, that it equals the alleged unearned premium; (6) errors of law in the instructions given by the court. The action was tried to a jury, and its verdict was in favor of plaintiff. Judgment was entered upon the verdict and appeal therefrom perfected to this court. Held, for reasons stated in the opinion, that the judgment should be affirmed. *Horawill v. North Dakota Mutual Fire Ins. Co.* 600.
14. A motion for a new trial must specify the grounds of the motion, and, when it is made on the minutes of the court, the moving party cannot successfully appeal from an order denying the motion, without first causing a statement of the case to be settled and made a part of the record so the appellate court may examine and consider "the minutes of the court." *Kanable v. Great Northern Ry. Co.* 619.

ARMY AND NAVY.

1. The State Moratorium Act (Laws 1918, chap. 10), is available to a soldier who has been in the active military service of our government, even after his discharge, for the period of time prescribed in the Act. *Strand v. Larson*, 7.

ATTORNEY AND CLIENT.

1. Where an attorney, having made a contract for a contingent fee in a personal injury action, has been dismissed by his client, who has thereafter employed other attorneys to prosecute the action, and where such action is finally settled, and moneys retained by the defendant therein, to cover the amount of the first attorney's lien claimed, with the knowledge and without the objection of such attorney, it is held, upon an action by such attorney to recover payment for his lien, that the amount of recovery must be based upon the reasonable value of the services performed or the actual damages sustained by breach of the contract. *Simon v. Chicago, M. & St. P. R. Co.* 251.
2. Where in such action, by the first attorney, it appears that the second attorneys employed are interested, by reason of their contingent contract, in the amount retained, and, further, that their contract contains the stipulation that no settlement shall be made by their client without their consent, it is held that such contract provision is void as against public policy, and their interest, if any, in the fund involved, must be determined by the reasonable value of their services rendered, if not fully theretofore paid. *Simon v. Chicago, M. & St. P. R. Co.* 251.
3. In such action, it is further held that the former client of such attorneys is properly a party interested, and is entitled to receive any moneys remaining after the payment of the amount justly due his attorneys. *Simon v. Chicago, M. & St. P. R. Co.* 251.

BANKS AND BANKING.

1. Subdivision 14 of Sec. 132, Compiled Laws of 1913, which makes it the duty of the state auditor, "to inspect, in his discretion, the books of any person charged with the receipt, safeguarding, or disbursement of public moneys," and Sec. 135 of the Compiled Laws of 1913, which gives the auditor access "to all state offices during the business hours for the purpose of inspecting such books, papers and accounts therein as may concern his duties," are construed in conjunction with Chapter 147 of the Session Laws of 1919 which provides for the creation of the Bank of North Dakota, and it is held: The examination of the Bank of North Dakota is not a part of the duties of the state auditor. *State ex rel. Kositzky v. Waters*, 115.
2. In this case the plaintiff recovered a verdict and judgment against the defend-

BANKS AND BANKING—continued.

- ants for \$1,387.66, and interest, as the balance due on fifty shares of bank stock which Olson sold to defendant Lee. Held, that there is no evidence to sustain the verdict. *Olson v. Baker*, 396.
3. In an action on a promissory note which the plaintiff bank had discounted for the defendant bank, where it appeared that the defendant bank was operated under the management of its president who indorsed the note and who, together with the cashier, guaranteed payment and agreed to repurchase after maturity, the defendant bank defended on the ground that the officers referred to did not have authority to rediscount paper of the bank. It is held: Though the officers of a bank may not have actual authority to rediscount paper by reason of limitations in the by-laws and in the regulations of the State Banking Board limiting the power of banking institutions to contract debts, where it is shown that the stockholders and directors of the bank allow the institution to be run by an officer who is accustomed to transacting all the ordinary business of the bank, and where such officer contracts for a rediscount of paper belonging to the bank, drawing a draft therefor in favor of the bank which is later paid, the bank and its receiver are precluded from asserting the lack of authority of such officer as against a purchaser of the paper who took without knowledge of the limitations or without knowledge of the facts which would make the limitations operative. *Farmers State Bank v. Couture*, 401.
 4. Where an agent borrowed money upon a promissory demand note from a bank, and signed the same in the manner above stated, and the principal denies authority of the agent to sign the note, but receives and retains the benefit and proceeds of the loan for which such note is given, and where the principal subsequently has a deposit in the same bank, the bank may charge the note to that account. *American Yeomen v. Farmers Equity State Bank*, 532.

BILLS AND NOTES.

1. In an action for the payment of two promissory notes, given in consideration of the right to control the manufacture and sale in North and South Dakota of a patented seed disinfecter, and made payable to the plaintiff or his order at the Stockman's Bank, Gillette, Wyoming, where it appears that the notes do not bear on their face the words "given for a patent right," or similar words, it is held: (1) The validity of a sale of an interest in a patent right is not affected by the taking of notes for the purchase price, not stamped as required by Sec. 10,251, Compiled Laws of 1913. *McCabe v. Williams*, 330.
2. Section 10,251, Compiled Laws of 1913, does not declare an unstamped written obligation for the payment of money in a patent-right transaction to be void. The penalties of the statute are not to be extended by judicial construction. *McCabe v. Williams*, 330.

BILLS AND NOTES—continued.

3. Where notes given in consideration of the purchase price of an interest in a patent right are not stamped by the payee in the manner required by Sec. 10,251 Compiled Laws of 1913; and where, in an action by the payee, the maker offered no evidence of any defense to the instrument other than the fact that it was not properly stamped, though other defenses were pleaded, the payee is entitled to judgment for the amount due. *McCabe v. Williams*, 330.
4. When, without any consideration, a person signs his name on the face of a promissory note, he becomes a guarantor of payment and is primarily liable for the debt; but when the debt is paid or secured, in whole or in part, the holder of the note may not return the payment or cancel the security and still collect from the guarantor the whole debt. The payment may not be cancelled or the security released, thrown away, or impaired; the security must be held as a trust for the benefit of the guarantor; the debt is paid to the extent and value of the security released or made unavailable. *State Bank v. Edwards*, 341.

BREACH OF MARRIAGE PROMISE.

1. An action for breach of promise to marry is predicated upon the proposition that the defendant has breached a valid existing contract to marry. *Kuhn v. Marquart*, 482.
2. Where defendant sets up as a defense that he has been released from the contract to marry, the burden of proof is on him to show such release. *Kuhn v. Marquart*, 482.
3. For reasons stated in the opinion, it is held that the court's instructions relating to the burden of proof were not erroneous. *Kuhn v. Marquart*, 482.

CARRIERS.

1. In an action for personal injuries, where the plaintiff became a passenger on a freight train to an accepted destination, and where, after arrival at such destination, the plaintiff, pursuant to direction of the defendant, alighted after the train had again started, upon the claim that the defendant had failed to give notice of the arrival at destination, and that he was unaware of such arrival during the time the train was at rest, and where the plaintiff was injured by alighting in a hole, or uneven piece of ground, covered with ice and snow, it is held: That it was the duty of the defendant to carry the plaintiff safely to his destination, and to afford him a reasonable opportunity to alight safely at such destination; that this included, as corollary duties, notification of arrival at his destination, and a reasonably safe place where the passenger should alight, or where he did alight, pursuant to the directions of the defendant. *Faubion v. Minneapolis, St. P. & S. Ste. M. R. Co.* 289.

CARRIERS—continued.

2. That, upon the record, the failure of such duties on the part of the defendant, and the questions of the exercise of due care by the plaintiff, under the circumstances, were questions of fact for the jury. *Faubion v. Minneapolis St. P. & S. Ste. M. R. Co.* 269.

CERTIORARI.

1. While a writ of certiorari will not issue unless it may serve some good purpose, where the proceeding is had to review an admittedly void order of a school board, the inquiry to determine whether a good purpose is served thereby will not extend to the determination of the legality of prior acts, of the board which may properly be inquired into in the civil action substituted for quo warranto. (Comp. Laws 1913, Sec. 7969.) *State ex rel. Mayo v. Thursby-Butte Special School District*, 555.

COMMERCE.

1. Section 136 of the Constitution, and Secs. 5238, 5240, 5242 and Secs. 4518 and 4521, Comp. Laws 1913, as amended by Chapter 99 of the Session Laws of 1917, and chapter 4 of the laws of the Special Session of 1918, all of which relate to the authority of foreign corporations to do business in this state and to the effect of the failure to secure the privilege and to file an annual statement with the secretary of state, are construed in the light of article 1, Sec. 8, of the Constitution of the United States, relating to interstate commerce; and it is held that the state has no power to impose conditions, restrictions, or burdens upon interstate commerce in the absence of congressional authority. *Dahl Implement & Lumber Co. v. Campbell*, 239.
2. Where a statute purports to prohibit a foreign corporation from "doing any business within this state," and its application to interstate commerce would impose a condition or burden upon interstate commerce prohibited by the Federal Constitution, the statute will be construed as applicable only to the transaction of intrastate business. *Dahl Implement & Lumber Co. v. Campbell*, 239.
3. Where a foreign corporation sells within this state goods located in another state, where it has its principal place of business, which sale is followed by delivery and transportation to this state, the transaction is one in interstate commerce, which is not prohibited by the statutes above referred to. *Dahl Implement & Lumber Co. v. Campbell*, 239.

CONSTITUTIONAL LAW.

1. This action involves the constitutionality of chapter 188, Laws 1919. It is held: That the act does not contravene the 14th Amendment to the Federal Constitution. *Daly v. Beery*, 287.
45 N. D.—42.

CONSTITUTIONAL LAW—continued.

2. By chapter 214, Laws 1919, as amended and re-enacted by chapter 61, Laws, Special Session 1919, it is provided that "for the years 1919 and 1920 the total annual amount of taxes levied for any purpose, except special levies for local improvements and for the maintenance of sinking funds, in any county . . . or in any village, town or city within the state, shall not exceed more than 10 per cent the amount that would have been produced by the levy of the maximum rate provided by law upon the assessed valuation of 1918." And that "in all cases wherein levies have been made or salaries or debts increased, . . . contrary to the limitations prescribed" therein, "the same shall be revised and corrected so as to conform to the provisions of chapter 214, Laws of North Dakota," as amended by said chapter 61. The plaintiff brought this action to restrain the defendant county auditor from applying said act to the levy made by the city of Bismarck in September, 1919, on the grounds: (a) That chapter 214, Laws 1919, did not apply to cities; and (b) that chapter 61, Laws, Special Session, 1919, in so far as it attempted to so apply, is unconstitutional. For reasons stated in the opinion, plaintiff's contentions are overruled, and it is held that his complaint does not state facts sufficient to constitute a cause of action. *State ex rel. Arnot v. Flaherty*, 549.

CONTRACTS.

1. In an action to recover moneys paid or due under a rescinded contract, where the parties differed upon the true consideration of such contract, the trial court did not err in submitting to the jury the sufficiency of plaintiff's tender of performance or his justification in refusing to perform. *Pattee v. Prall*, 107.
2. Before an acceptance of an offer becomes a binding contract, the acceptance must be unconditional, and must accept the offer without modification or the imposition of new terms. *Pollak v. Roberts*, 150.
3. In this case it appears that defendant Donovan owned two lots in Mowbray, North Dakota, and in the year 1908 he contracted with the plaintiff to construct on said lots a grain elevator of specified dimensions, in accordance with plans and specifications, to be of 40,000 bushels capacity. Donovan agreed to pay for the same \$7,000, excess freight \$240.27, and one sieve, \$20.50, making \$7,260.77. He has paid in all \$4,154.60. The balance due is \$3,106.17, for which judgment is ordered with costs. The defense was that the elevator had not a capacity of 40,000 bushels. It is held: Particular descriptions qualify those which are general; that expressions of quantity must yield to particular descriptions; that descriptive words, with definite and certain meaning, control the expressions of quantity. *Honstain Brothers Co. v. Linden Invest. Co.* 210.
4. To rescind a contract upon the ground of intoxication of the maker, the evi-

CONTRACTS—continued.

dence must disclose that he was in such a degree of intoxication, at the time, so as to thereby render him entirely incapable of understanding the nature and effect of the transaction. *Renfeldt v. Brush-McWilliams Co.* 224.

5. In an action to rescind certain contracts, notes and mortgages, made in connection with the sale of land, upon ground of intoxication, it is held, upon the record, that the evidence does not affirmatively show that the maker was so intoxicated, as to make rescission, under the rule stated. *Renfeldt v. Brush-McWilliams Co.* 224.

CONVERSION.

1. This is a suit for the conversion of personal property on which the plaintiff has a chattel mortgage. The answer is that the property was levied on and seized under the writ of attachment against the mortgagor, and that the mortgage was taken with intent to hinder, delay and defraud creditors. The issue, as presented by the pleadings and the evidence, was one of fact and not law. Manifestly the court erred by directing a verdict in favor of the defendants. *Turton v. Bingenheimer Mercantile Co.* 98.

CORPORATIONS.

1. In an action brought upon promissory notes given in payment for a second-hand threshing rig and to foreclose a chattel mortgage securing the same, where it appears that the plaintiff is a foreign corporation which has not complied with Sec. 5238, Comp. Laws 1913, and where the defendants rely upon an attempted rescission of the contract for misrepresentation and fraud and also seek damages for breaches of warranty, it is held: Where a foreign corporation with its principal office in a town in a sister state near the state line, is shown to have solicited business generally in tributary territory within this state, any transaction consummated by it in furtherance of its business is not an "isolated" transaction within the rule that single or isolated transactions do not violate Sec. 5238, Comp. Laws 1913, which prohibits the doing of business in this state by foreign corporations without first filing a copy of their charter. *Dhal Implement & Lumber Co. v. Campbell*, 239.
2. Subdivision 3 of Sec. 4557, Comp. Laws of 1913, which requires a favorable vote of at least two thirds of the entire capital stock of a corporation to increase the capital stock, is construed and it is held, for reasons stated in the opinion, that the expression "entire capital stock" means the entire issued or subscribed stock, and not the entire authorized stock. *Missouri Valley Grocery Co. v. Hall*, 419.

COURTS.

1. Inasmuch as two of the judges of the supreme court are of the opinion that

COURTS—continued.

the act does not violate any provision of the state Constitution, it cannot be said that the act is unconstitutional as violative of the state Constitution, in view of Sec. 89 of the Constitution as amended (Laws 1919, article 25, P. 503); which provides that in no case shall any legislative enactment or law of the State of North Dakota be declared unconstitutional unless at least four of the judges of the supreme court so decide. *Daly v. Beery*, 287.

CRIMINAL LAW.

1. The defendant was convicted upon an information which charged him with obtaining money under false pretenses; therein it was alleged that the defendant falsely represented that one Laughery was a civil engineer; that it was necessary to employ a competent civil engineer to perfect a preliminary survey for the proposed railway; that such preliminary survey was necessary in order to secure the necessary financial aid; that it was necessary in order to secure the services of Laughery for such purposes that he be paid in advance \$4,000. The information further negated the false pretenses as follows: "Whereas, in truth and in fact the said pretenses and representations so made as aforesaid were false, untrue and fraudulent, and whereas, in truth and in fact the said Laughery was not a civil engineer and was and is not familiar nor capable and competent of doing railway surveying or engineering and knew nothing of such work." It is held that such allegations sufficiently negative the allegations of the false pretenses. *State v. Henderson*, 19.
2. An appeal from a judgment and a motion for a new trial are independent remedies. A district court has jurisdiction to hear and determine a motion for a new trial in a criminal case made within the statutory time, although an appeal has been taken from the judgment of conviction. *State v. Stepp*, 516.
3. In a criminal prosecution for statutory rape, where the state, upon cross-examination of the defendant, and also of his wife, has inquired concerning his relations with his present wife, some sixteen years ago, in Maryland and Virginia, anterior to their marriage, and while the defendant had a former wife, seeking thereby to impute to the defendant improper, if not illegal, relations; and where further, upon argument to the jury, the state, through a private prosecutor, made statements to the effect that the defendant left his first wife and children of tender years and went away with his present wife, before he secured a divorce from the former, it is held that such cross-examination, and such statements considered in connection with the findings thereupon by the trial court, constitute prejudicial error, for which a new trial must be granted. *State v. Stepp*, 516.

DAMAGES.

1. In an action for personal injuries occasioned to the plaintiff by the alleged

DAMAGES—continued.

- negligence of the defendant, consisting in allowing the veneered brick wall of a building to remain in such condition that it was likely to fall and injure persons in the vicinity; it appearing that the wall did fall, some of the bricks striking the plaintiff and inflicting injuries upon her head, back and shoulders; plaintiff and experts testifying on her behalf claiming that her injury had resulted in a condition of permanent paralysis due to traumatic neurosis; the defendant and experts testifying on her behalf contending that the plaintiff's injuries were of a temporary character, and that she is not paralyzed, but afflicted with hysteria—the evidence is examined and it is held: That the character and extent of the injuries of the plaintiff present questions of fact for the consideration of the jury. *Larson v. Russell*, 33.
2. On the supposition that the plaintiff was injured as claimed, and as there is substantial evidence tending to show, the damages awarded are not excessive. *Larson v. Russell*, 33.
 3. This is a personal-injury suit, in which the plaintiff recovered a verdict for \$4,000. It is not excessive. *Lilly v. Elm Point Mining Co.* 464.
 4. General damages, considered synonymous with actual or compensatory, and as contradistinguished from exemplary or punitive damages, in an action for libel, are such as the law implies and presumes to have occurred from the wrong complained of. They are such as naturally and necessarily result from the wrong. In actions for libel (or other tort), general damages are such as are not caused by any incidental fact or by the peculiar situation and circumstances of the party, but are the natural and uniform effects of the injury itself. *Meyerle v. The Pioneer Publishing Co.* 568.
 5. Special damages, as contradistinguished from general damages, are those which are the natural, but not the necessary, consequences of the act complained of. They are such as actually result from the wrong, but are not such a necessary result that they will be implied by law. In cases of libel (or other tort), it may be said that special damages are such consequences of an injury as are peculiar to the circumstances and condition of the injured party. *Meyerle v. The Pioneer Publishing Co.* 568.

DEEDS.

1. Where deeds are executed and left with a scrivener, accompanied with the statement that the grantor wanted the same recorded, if anything happened to her, the question of a constructive delivery thereof to the grantee named is a question of fact, to be determined from the evidence whether the grantor deposited such deeds with a stranger and with intent to part with all control and dominion thereover. *Magoffin v. Watros*, 406.
2. The burden is upon the grantee, asserting the title, to prove such constructive delivery, and upon failure so to establish, by proof, the deeds will be adjudged invalid for want of delivery. *Magoffin v. Watros*, 406.

DESCENT AND DISTRIBUTION.

1. Where a prescriptive title to land is claimed under Sec. 5471, Comp. Laws 1913, through adverse possession and continuous payment of taxes for over ten years, by one who received a deed, subsequently lost and unrecorded, from his wife, one of the heirs of a deceased entryman, who, by will, had devised such land to such wife, and, where, upon final proof made by the wife, a United States patent is issued to the heirs of such deceased entryman, it is held:
 - (a) That the adverse claimant, the husband, named as an executor in the will, and knowing the nature of the title, is in the position of a cotenant with the other heirs in the land patented, and must establish affirmatively adverse and hostile possession by acts that serve to oust or dispossess the other tenants.
 - (b) That the heirs having received specific bequests under the will, without knowledge of their rights, as cotenants, in the land, are not estopped to assert their titles. *Stoll v. Gottbreht*, 158.

DISTRICT AND PROSECUTING ATTORNEYS.

1. Section 3381, Comp. Laws 1913, was not impliedly repealed by chap. 178, Session Laws 1901 (Comp. Laws 1913, Sec. 3376). *State v. Stepp*, 516.
2. Pursuant to Sec. 3381, Comp. Laws 1913, the district court may appoint, in its discretion, special counsel to assist the state's attorney in important cases. This power or discretion, however, should not be exercised where it appears that the officials whose duty it is to prosecute can properly represent the interests of the state. *State v. Stepp*, 516.

DIVORCE.

1. A motion to vacate and set aside decree for divorce, taken by plaintiff against defendant, was made under and pursuant to the provisions of Sec. 7483, Comp. Laws 1913. The trial court made and entered an order denying the motion. It is held, for the reasons stated in the opinion, that this was an abuse of discretion. *Talbott v. Talbott*, 489.

EQUITY.

1. Where it is plain that the insured has done all that he could do to effect the change of beneficiary in a fraternal benefit certificate, and unforeseen and unavoidable conditions and circumstances prevent the completion thereof, and, in equity and good conscience the change should be effected to carry out the intentions of the insured, a court of equity will regard that as done which ought to be done. *Taylor v. Grand Lodge of A. O. U. W.* 468.

EVIDENCE.

1. The plaintiff, who is an architect, entered into a written contract with the defendant, by which he agreed to furnish plans and specifications "for a theatre, store and apartment building for site 65x125 feet to be erected in Grand Forks, North Dakota," for which the defendant agreed to pay a certain per cent of the cost of the building. Nothing was said in the contract about the cost of the building. It is held that evidence was admissible to show that it was the understanding of the parties that the building should not cost more than \$60,000. *Keck v. Kavanaugh*, 81.
2. Certain evidence offered by plaintiff for the purpose of showing the amount and value of the work done in preparing the plans and specifications and the contents of letters written by him to various contractors who submitted bids for the proposed building held properly excluded for reasons stated in the opinion. *Keck v. Kavanaugh*, 81.
3. In a contract involving the sale of real estate and of bank stock, parol testimony is admissible for the purpose of ascertaining the true consideration. *Pattee v. Prall*, 107.
4. Where an original letter written by the plaintiffs to the defendant had been in the possession of the defendant, and preliminary proof of its loss is made through a search of the possession of its custodian, no notice of demand upon the adverse party to produce such letter is requisite in order to admit in evidence secondary evidence of its contents. *Kalman v. Dinnie*, 112.
5. It is held, in the circumstances of this case, the court did not err in admitting in evidence the minutes of a certain stockholders' meeting of the plaintiff corporation, it appearing that defendant was present at such meeting and knew, or must be held to have known, what transpired at such meeting. *Dakota Coffee Co. v. Johnson*, 430.

EXECUTORS AND ADMINISTRATORS.

1. The administrator, as the representative of the state of the deceased, has authority to maintain an action to determine adverse claims concerning the possession, the interest, or the title of the estate therein. *Magoffin v. Watros*, 406.
2. Jacob Herr and Susanna Munsch Herr, prior to the time of their marriage entered into a written antenuptial agreement, the validity of which for the purposes of this action is assumed but not decided, whereby she agreed that, in case of his death prior to hers, she should receive out of his estate the use of the homestead during her life, and the sum of \$2,000 and no more. Held, for reasons stated in the opinion, that, she is not thereby precluded from claiming or taking her exemptions under Sec. 8725, Comp. Laws 1913, but, notwithstanding such agreement, she is entitled to such exemptions. *Herr v. Herr*, 492.

FALSE PRETENSES.

1. In such action where \$4,000 in money belonging to the parties interested was put up in a bank, and the defendant secured the same as a method of convenience in the form of a draft, it is held, that the false pretenses exercised operated to deprive the parties of money. *State v. Henderson*, 19.
2. In such action where the evidence discloses that the party whom the defendant represented to be a consulting engineer was a carriage and automobile painter, and at times a traveling salesman selling varnish, who had never studied civil engineering and knew nothing about it, it is held that the proof of the false representations of the defendant concerning the party as a consulting engineer covered, upon the subject-matter involved, the term "civil engineer." *State v. Henderson*, 19.

FORCIBLE ENTRY AND DETAINER.

1. This rule is not abrogated or changed by Sec. 7175, Comp. Laws 1913, which provides that "for forcibly ejecting or excluding a person from the possession of real property the measure of damages is three times such a sum as would compensate for the detriment caused to him by the act complained of." *Davis v. Long*, 581.

GARNISHMENT.

1. (Upon reinstatement of appeal.) Failure to serve a garnishee summons upon a defendant or his attorney pursuant to the statute renders service on the garnishee null, void, and of no effect from the beginning, and it is unnecessary, in such event, to serve or file any formal notice of dismissal. *Solon v. O'Shea*, 362.

HOMESTEAD.

1. The "home" and "residence" of a person is the place where he commonly resides; a place to which, when absent, he returns, like a bee to its hive, a carrier pigeon to its home, a bird to its nest. *O'Hare v. Bismarck Bank*, 641.
2. From sale on execution the law exempts a homestead—a city lot and the dwelling house in which the owner and head of a family resides. When the wife owns the homestead her title and her exemption right are not affected by the death of her husband. While she continues the head of a family and resides in her home it is exempt. *O'Hare v. Bismarck Bank*, 641.
3. When the husband owns a homestead and dies leaving a wife and children the title does not vest in the wife, but she takes an estate for life or years, as provided by statute. *O'Hare v. Bismarck Bank*, 641.

INDIANS.

1. That the state may rightfully exercise political and governmental control over lands, formerly within such military reservation, and reserved by the United States for Indian school and Indian agency purposes, to the extent of including them within its political subdivisions for political and governmental purposes. *LaDuke v. Melin*, 349.
2. Trust-patent Indians holding allotted lands under the Federal Act of May 8th, 1906 (Burke Act) who have become civilized persons of Indian descent, and who have severed their tribal relations for two years next preceding an election, may be qualified electors at such election, under subdivision 2, Sec. 121, North Dakota Constitution, as amended. *Swift v. Leach*, 437.
3. Although such trust-patent Indians are still dependent upon the Federal Government concerning the rules and regulations enacted for their supervision, control and protection, under the national policy to assist the Indian towards emancipation, nevertheless, where it is shown that such trust-patent Indians have in fact become civilized persons of Indian descent, and in fact, for more than two years preceeding a general election have actually severed their tribal relations and have adopted the modes and habits of civilized life, and, where it appears under the testimony of the Superintendents of the Indian Agency in charge of such Indians, both present and former, and others, that they were qualified as civilized persons, to be electors, and no objection or complaint on behalf of the Federal authorities was urged against their exercising such privilege, and, where it further appears that in the exercise of the state right of suffrage, under the Constitution of this state, there was and is no conflict or interference with the Federal policy of wardship towards such Indians, it is held, upon the record, that such trust-patent Indians were electors at the general election held on Nov. 5th, 1918. *Swift v. Leach*, 437.

INDICTMENT AND INFORMATION.

1. Upon such information, it is held proper under the statute to allege by way of innuendo facts and circumstances, part of which may be true, which serve as a basis upon which the false pretenses may operate in order to secure the money or property. *State v. Henderson*, 19.

INSURANCE.

1. Where applications for hail insurance are signed by the applicants upon a farm, and then sent by mail to the local agent, without the notice or knowledge of the local agent as to the amount of the insurance, the specific crops or lands to be covered, Sec. 4902, Comp. Laws 1913, which provides that hail insurance shall take effect from and after twenty-four hours from the

INSURANCE—continued.

- day and hour the application for such insurance has been taken by the authorized local agent of the insurance company, does not apply. *Anderson v. Westchester Fire Insurance Co.* 456.
2. Where the local agent of a hail insurance company furnishes application blanks to one who has been assisting him in writing insurance, and instructs such party that he may sign the application blank on his own farm and send it to him by mail, and that such may be one under the instructions of the hail insurance company, which provides for insurance becoming effective twenty-four hours from the day and hour of the actual signing of the application; and where, pursuant thereto, such party signs an application blank and causes another, his brother-in-law, so to do upon his farm, on July 19, 1918, at 8 P. M., and thereupon deposits the same in a rural mail box on July 20, 1918, without the notice or knowledge of the local agent as to the amount of the insurance, specific crops or lands to be insured or the specific company to which such application is made; and where such application blanks so signed, in the course of the mail, are not received by the agent until July 22, 1918, during which time hail losses have been sustained upon the crops covered in the application, concerning which losses the local agent is advised, before he actually signs such application,—It is held, that under the instructions of the defendant, the provisions in the application blanks, and the directions given by the local agent, the minds of the parties never met upon the terms or conditions of any contract of insurance existing at the time when the hail losses were sustained. *Anderson v. Westchester Fire Insurance Co.* 456.
 3. Where the constitution, by-laws or regulations of a fraternal order which issued benefit certificates providing for the payment of death benefits at the death of the member, prescribe the acts to be done, at the will of and by the insured, to effect a change of beneficiary, and the insured has done some of the acts to effect such change, but dies before the change is fully completed, and it is equitable to regard all he should have done to complete the change of beneficiary as done, a court of equity will so regard it, and give effect to his intentions to change the beneficiary, notwithstanding the acts done by the insured were not a full compliance with the requirements of the constitution, by-laws, etc. *Taylor v. Grand Lodge of A. O. U. W.* 468.
 4. Where a principal admits the agency of one who executes a promissory demand note, and signs his and the principal name thereon, and in such a way that the relation of principal and agent appears upon the face of the note, the note being given to a bank for a loan, and the money is advanced thereon and paid over, by the agent, to the principal, and the principal thereafter denies the authority of the agent to thus execute the note, such principal is in no position to claim the right to retain the money it received upon the note, while denying liability thereon. *It cannot disavow*

INSURANCE—continued.

the authority of the agent to make the contract, and at the same time retain the benefit thereof of his unauthorized act. *American Yeomen v. Farmers Equity State Bank*, 532.

5. In an action on an insurance policy which had lapsed for nonpayment of a premium prior to the death of the insured, it is held, for reasons stated in the opinion, that the evidence is insufficient to establish payment of the delinquent premium and further insufficient to establish a waiver of the conditions of the policy regarding reinstatement. *Wehsner v. Kansas City Life Insurance Co.* 627.

JUDGES.

1. Judge Buttz of the then second judicial district, by written request, called Judge Cooley of the then first judicial district to preside at a special term of court, in the second judicial district, at which the case in question was tried by the plaintiffs, the defendant making no appearance. A judgment was entered for the plaintiffs. Subsequently, defendant made a motion to vacate and set aside the judgment, on the ground of inadvertence and excusable neglect, and noticed it to be heard before Judge Cooley, at Grand Forks, in the first judicial district. Held, in these circumstances, that Judge Cooley had jurisdiction to hear and determine such action. *Peterson v. Finnegan*, 101.

JUDGMENT.

1. A verdict was directed for defendant. The trial court made an order for judgment, reciting the direction of the verdict, and ordering judgment for costs in favor of defendant. On November 21, 1918, judgment was entered in conformity with the order, and notice of entry thereof served. On May 7, 1919, a second order for judgment was signed and judgment entered thereon. The second order and judgment are like the first, except that they recite that the action is dismissed.
It is held that the first judgment was a final determination of the rights of the parties; that the entry of the second judgment was of no consequence, and that no rights were affected thereby. *Dickson v. Salisbury*, 26.
2. The court did not abuse its discretion in ordering the vacation of the judgment. *Peterson v. Finnegan*, 101.
3. In an application to vacate a judgment, the district court entered an order denying it. Held, for the reasons stated in the opinion, that the denial of such application constituted, in this case, an abuse of discretion. *Fylling v. Mork*, 119.
4. By virtue of the full faith and credit provision of the Federal Constitution, the courts of this state are bound to give to the judgment of a sister state

JUDGMENT—continued.

the same faith and credit, and only the same, which it has in the state where it was rendered; if re-examinable, or subject to defense on certain grounds there, it is open to the same inquiries and subject to the same defenses here. *Shary v. Eszlinger*, 133.

5. The requirements that full faith and credit shall be given in one state to the judgments obtained in another will not prevent the courts of this state, in which legal and equitable rights and remedies are administered in one court and in one form of action, from permitting an equitable defense to be interposed against a judgment obtained by fraud in another state, where the courts of the state where the judgment was rendered are authorized to vacate or enjoin the enforcement of a judgment obtained by fraud. *Shary v. Eszlinger*, 133.
6. An application to set aside a judgment obtained by means of fraudulent acts on the part of the plaintiff is not controlled by Sec. 7483, Comp. Laws 1913. The district courts have inherent power to vacate fraudulent judgments. *Rykowsky v. Bentz*, 499.
7. For reasons stated in the opinion, it is held that defendant's motion to vacate a default judgment in this case should have been granted. *Rykowsky v. Bentz*, 499.
8. One who possesses a cause of action which may be used affirmatively, or as a defense, may use it for purposes of offense or defense, but he cannot do both, when it serves thereby to compel the obligor of the debt to answer or respond twice for the same claim. *Miller Co. v. Harvey Mercantile Co.* 503.
9. One may not claim a share of the same debt for the same amount without class because preferred, and then again within such class because not preferred. If, in resulting effect, one secures and enforces a lien including the debt, there is a merger of the cause of action for the enforcement of the original debt alone. *Miller Co. v. Harvey Mercantile Co.* 503.
10. The bar or plea of *res judicata* is available between the same parties and their privies upon every question, issue, claim, and defense presented in a former suit. *Miller Co. v. Harvey Mercantile Co.* 503.
11. In an action of sequestration, where the plaintiff seeks to recover on its debt, evidenced by a judgment, out of the assets of an alleged insolvent corporation, alleged to have been transferred unlawfully and preferentially, and upon the liability of the officers and directors of such corporation, by reason thereof; and where it appears that the debt upon which recovery is sought was formerly evidenced by certain notes secured by chattel mortgages upon certain elevator property, and that, in an action of conversion of such property brought by one of the defendants, claiming title through a bill of sale from such alleged insolvent corporation, the plaintiff asserted in defense the same debt, the lien of its chattel mortgages, and the unlaw-

JUDGMENT—continued.

ful preferential character and the illegality of the transfer so made through a bill of sale, without consideration, all to defeat the right of such defendant in the conversion action; and where, further, it appears, that by reason thereof, the plaintiff asserted and enforced the same debt, or some part thereof, and the lien of its mortgages beyond mere mitigation of damages,—it is held, upon the principles of law hereinbefore stated, that the plaintiff is estopped to enforce this same debt in such action. *Miller Co. v. Harvey Mercantile Co.* 503.

12. The defendant interposed a plea of *res judicata*. Held, for the reasons stated in the opinion, that such principle, under the facts in this case, has no application. *Carlson v. Davis*, 540.

LANDLORD AND TENANT.

1. The obligation of a lessee to make repairs which does not relate specifically to the defect causing plaintiff's injuries does not exonerate the owner of the building from liability. *Larson v. Russell*, 33.
2. The plaintiff, lessee in a farm lease, claimed that the number of bushels of wheat threshed were 8,366 bushels, machine measure. The lessor claimed, in all, there were 5,824 bushels and 24 lbs of wheat elevator weights. The lessee was not in default in any manner in the performance of the covenants of the lease. The lease contained no covenant reserving the right of the lessor to deduct for any advances made the lessee during the time of the lease. Under a chattel mortgage the lessor, the defendant, took possession of all the wheat at the time of threshing thereof, and thereafter exercised complete and exclusive dominion over it. He hauled it to the elevator, deposited it all in his name, and sold it. The lessee brought an action for the value of one half of 8,366 bushels of wheat, and by the jury was given a verdict for the value thereof, less certain debts and obligations owing by him to the lessor, to the allowance of which the lessee made no objection. Held, that the verdict as to the amount of wheat threshed is not supported by substantial evidence. *Carlson v. Davis*, 540.
3. The defendant interposed, as a defense, a claim of prior settlement between plaintiff and defendant, of all matters in dispute. Whether such a settlement was made was a question of fact for the jury. The evidence thereof was in conflict. The jury returned a verdict in plaintiff's favor, and thus decided there was no settlement. *Carlson v. Davis*, 540.
4. The occupancy of a house by a man hired to operate a farm for a certain monthly wage, and the use of the house thereon to live in with his family, is incidental to the employment, and the right thereto ceases with the termination of the service. In such case the possession of the employee is in legal effect, the possession of the employer. *Davis v. Long*, 581.

LIBEL AND SLANDER.

1. In an action against a newspaper for publishing an article, libelous per se, the party injured, under constitutional and statutory provisions, may be awarded general, special and exemplary damages. *Meyerle v. The Pioneer Publishing Co.* 568.
2. Pursuant to Sec. 9652, Comp. Laws 1913, which provides for a demand of retraction concerning the publication of libelous matter in a newspaper prior to the institution of any action for libel, and for an opportunity of retraction in the newspaper, the person injured by a publication libelous per se is not limited, although full retraction has been made, to the recovery of only special damages. He may recover his actual or compensatory damages. *Meyerle v. Pioneer Publishing Co.* 568.
3. The evident purpose and intent of such statutes, Sec. 9652, Comp. Laws 1913, considered in connection with the constitutional provisions concerning the right of free speech and publication, and the right of redress for legal wrong occasioned thereby, is to afford an opportunity to mitigate the actual or compensatory damages recoverable, by showing the absence of malicious intent, and to eliminate exemplary damages, by means of a full retraction made, as an element of recovery. *Meyerle v. Pioneer Publishing Co.* 568.
4. In an action for the publication in a newspaper of an article libelous per se, it is not necessary, in order to state a cause of action for at least nominal damages, to allege service of a demand for retraction pursuant to Sec. 9652, Comp. Laws 1913, and to allege special damages. *Meyerle v. Pioneer Publishing Co.* 568.
5. In an action for libel against a newspaper, where the complaint has failed to allege notice of a demand for retraction under Sec. 9652, Comp. Laws 1913, and has also failed to allege any special damages, and where demurrer has been interposed thereto upon the ground that such complaint does not state a cause of action by reason of such failure, it is held that the complaint states a cause of action for at least nominal damages. *Meyerle v. Pioneer Publishing Co.* 568.

LIMITATIONS OF ACTIONS.

1. Except in actions which are duly prosecuted under the Employers' Liability Acts, and within the time limits of those acts, "an employer is not bound to indemnify his employee for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed, nor in consequence of the negligence of another person employed by the same employer in the same general business." Comp. Laws, Sec. 6107. *Kanable v. Great Northern Ry.* Co. 619.

MASTER AND SERVANT.

1. By direction of defendant, the plaintiff tried to work in a dangerous place

MASTER AND SERVANT—continued.

on a trestle, where he had to stand on a narrow rail. He lost his balance, fell, fractured a rib and was severely injured. *Lilly v. Elm Point Mining Co.* 464.

2. In this case plaintiff appeals from a judgment on a directed verdict. The verdict was directed on a motion which argues the merits of the case and covers nine pages of the record; and on the merits the motion was granted. That was error. The facts, which speak louder than words and the testimony of plaintiff were sufficient to sustain a verdict in his favor. On a motion to direct a verdict against a party his testimony should be taken as true, unless clearly false. The motion is in the nature of a demurrer to the evidence and the conceded facts. It does not question the legal sufficiency of the pleadings, which may be amended to conform to the evidence. It raises merely a question on the legal sufficiency of the evidence to sustain a verdict against the moving party. 38 Cyc. 1564-1569. *Thompson v. Smith*, 479.

MORTGAGES.

1. In an action to vacate a satisfaction of a mortgage, and to foreclose the mortgage, it is held that the trial court erred in granting a motion made at the close of the plaintiff's case for a dismissal of the action on the ground that plaintiff had failed to establish his cause of action. *Murphy v. Wilhelmsen*, 369.
2. Where one who has purchased land subject to and with knowledge of certain encumbrances against it (the amount of which is in effect deducted from the purchase price), pays the amount due upon and procures an assignment of one of such mortgages, the mortgage is discharged. *Bull v. Smith*, 613.

NEGLIGENCE.

1. Where a wall had been condemned by city authorities as being unsafe, and the defendant owner had full knowledge thereof, and where it is not shown that the plaintiff knew of the defects, the negligence of the defendant in allowing the wall to remain in an unsafe condition is actionable at the suit of one who was injured while rightfully on the premises. *Larson v. Russell*, 33.
2. Where the evidence shows that a boy, fourteen years of age, climbed upon the running board of defendants' automobile, and with their knowledge and implied consent remained thereon during a trip on a country road, for a distance of between 6 and 7 miles, when the automobile, at a curve in the road, left the road and collided with a wire fence, and one leg of the boy was so lacerated and torn, that it was required, later, to amputate the same, it was error for the trial court to direct a verdict for the de-



NEGLIGENCE—continued.

- defendants and to refuse to submit the question of defendants' negligence to the jury; and this, though there were no proof, against the defendants of active negligence. *Grabau v. Pudwill*, 423.
3. In view of the youth of plaintiff, the nature of the acts causing the injury, and the attendant circumstances and conditions accompanying such acts, proof of which appears in the evidence, the question of defendants' negligence was one for the jury. *Grabau v. Pudwill*, 423.

NEW TRIAL.

1. A motion for a new trial on the ground of newly discovered evidence is addressed largely to the sound, judicial discretion of the trial court. Such discretion is to be exercised in determining the diligence shown, the truth of the matters stated and the materiality and probability and the effect of them, if believed to be true. It is presumed that the discretion was properly exercised; and the appellate court will not interfere unless an abuse of such discretion is clearly shown. *Keck v. Kavanaugh*, 81.
2. Insufficiency of the evidence does not constitute a ground for a new trial in an action properly triable, and tried, to the court without a jury under Sec. 7846, Comp. Laws 1913. *Bull v. Smith*, 613.
3. For reasons stated in the opinion it is held that a motion for a new trial on the ground of newly discovered evidence was properly denied. *Bull v. Smith*, 613.

OFFICERS.

1. In an action brought by the state, on relation of the attorney general, where the complaint alleged that one of the defendants had been appointed deputy bank examiner under Sec. 5146, Comp. Laws 1913, and that his appointment had not been approved by the state banking board, but, on the contrary, had been affirmatively disapproved; and where the only relief sought was injunctive in character, the granting of which would result in the creation of a vacancy in the office of deputy state examiner, it is held: Public offices exist for the public benefit, and the public policy of the state requires that they be filled and the duties thereof discharged. *State ex rel. Langer v. Lofthus*, 357.
2. In the absence of allegations showing the necessity of averting some threatened injury to the public or other interests directly affected, an injunction will not be granted to prevent one who is acting as deputy examiner, with the consent of the public examiner, from performing the duties incident to such deputyship. *State ex rel. Langer v. Lofthus*, 357.
3. Where no superior claim is made to the office of deputy examiner, and where no specific injury, either existing or threatened, is alleged, the complain

OFFICERS—continued.

does not present a case appealing to the extraordinary legal or equitable powers of the court. *State ex rel. Langer v. Lofthus*, 367.

PAYMENT.

1. In an action to recover the proceeds of a carload of oats, by mistake credited to the account of and paid to the defendant, where the defendant counter-claimed by alleging the consignment of two carloads of wheat to the plaintiffs for which no accounting has been made, it is held, upon this record, that the trial court did not err in directing a verdict for the plaintiffs. *Stair v. Marquart*, 384.

PLEADING.

1. Where the complaint alleges a partnership, and the owner admits such partnership, there is no issuable fact concerning the same, and proof, in denial, was properly rejected. *Stair v. Marquart*, 384.

PROCESS.

1. The plaintiff, a resident of North Dakota, commenced an action against the defendant, a resident of Wisconsin, by the issuance of a summons, and after the issuance of the summons, attached certain lands of the defendant in Burleigh County, North Dakota. No attempt was made to publish the summons, the plaintiff sending the same to the chief of police of Oconomowoc, Wisconsin, by whom it was served upon the defendant personally. No other effort was made to serve the summons or complaint upon the defendant within sixty days after the issuance of the warrant of attachment. Held, that under the statutes referred to in the opinion, the district court of Burleigh county, North Dakota in which the action was commenced, acquired no jurisdiction of the defendant, and properly dismissed the action. *Johnson v. Engelhard*, 11.

PUBLIC LANDS.

1. Where a deceased entryman had died before final proof, and one of his heirs, claiming as a sole devisee of the land, has made final proof in behalf of the heirs, and a United States patent has issued, to the heirs of the deceased entryman, such heirs take title to the land under the patent as cotenants, and as special purchasers or donees, and not by reason of any right or interest in the estate of the deceased. *Stoll v. Gottbreht*, 158.

SALES.

1. The evidence is examined, and it is held that it does not warrant a finding
45 N. D.—43.

SALES—continued.

- of misrepresentation of fact which would justify a rescission of the contract. *Dahl Implement & Lumber Co. v. Campbell*, 239.
2. It is further held that the defendants have established a warranty respecting the ability of the engine to do the work for which it was purchased, and damages for breach of that warranty. *Dahl Implement & Lumber Co. v. Campbell*, 239.
 3. Plaintiff seeks to cancel a note and mortgage given for a threshing outfit. He claims that he rescinded the sale on the ground of a breach of warranty by the seller. For reasons stated in the opinion, it is held that the plaintiff has failed to establish a rescission of the sale. *Tuveson v. Olson*, 415.
 4. Plaintiff brought this action to recover for the agreed purchase price of certain machinery, goods, wares, and merchandise, which it claimed to have sold defendant for the consideration mentioned in a certain bill of sale. Defendant maintained that the price mentioned in the bill of sale was larger than he agreed to pay, and he also adduced testimony to support a defense not pleaded, viz., that he had not purchased the property, but was merely financing the business. Whether or not there was a sale, or whether defendant was merely financing the business, was a question of fact for the jury. Its verdict was in favor of plaintiff. It is held, there is substantial evidence to sustain the verdict. *Dakota Coffee Co. v. Johnson*, 430.

SCHOOLS AND SCHOOL DISTRICTS.

1. In this case an election was held for the selection of a schoolhouse site in Fort Totten school district No. 30 in Benson County. One site received fifty-one votes, and another site received twenty-two votes. The election board refused to count the fifty-one votes, on the ground that the site designated by them was within the boundaries of the Fort Totten military reservation (also, that thirty of such fifty-one votes were cast by persons residing within said military reservation) and declared that the site designated by the twenty-two voters was the site chosen at such election. La Duke, a taxpayer and elector in such school district, instituted an election contest. He caused notice of contest, setting forth fully the grounds on which he assailed the findings of the election board, to be served on the proper parties. Such parties appeared and answered on the merits. Later the plaintiff and defendants entered into a stipulation of facts, and submitted the matter to the district court for determination on the merits. No objection was made in the trial court to the procedure adopted. It is held:—That the defendants cannot raise the question in the supreme court that plaintiff has chosen the wrong remedy. That the Fort Totten Military Reservation has been abolished by the Federal Government, and that the lands formerly included therein are no longer

SCHOOLS AND SCHOOL DISTRICTS—continued.

within the exclusive governmental and political control of the United States. *La Duke v. Melin*, 349.

2. That persons residing on the lands so reserved and otherwise qualified to vote, are entitled to vote at an election in the school district in which such lands are included. *La Duke v. Melin*, 349.
3. That a schoolhouse site located on such lands is within the school district, and may be legally selected by the voters of the district. *La Duke v. Melin*, 349.
4. In a certiorari proceeding to review an order annexing territory to the defendant school district, the defendants filed a return admitting the invalidity of the order, and in addition, set up prior annexation proceedings upon which they claimed the territory to have been previously legally attached to the defendant district, though the latter had not exercised jurisdiction based thereon, it is held:
 Certiorari being a special proceeding and not a civil action, the inquiry under the petition and writ will be confined to the order sought to be reviewed. *State ex rel. Mayo v. Thursby-Butte Special School District*, 555.
5. Under Sec. 8445, Comp. Laws 1913, as amended by chapter 76, Session Laws of 1919, the writ of certiorari issues only to review action by inferior courts, officers, boards, and tribunals who have exceeded their jurisdiction, and is not a remedy to determine the legality of annexation proceedings of a school board the validity of which may or may not depend upon jurisdiction. *State ex rel. Mayo v. Thursby-Butte Special School District*, 555.
6. A school board entered an order of annexation under Sec. 1240, Comp. Laws 1913, and all parties concerned acquiesced in the order for a period of nine months; thereafter one who had signed the petition and another whose complaint is based wholly on increased taxes brought an action to set aside the order of annexation and recover taxes paid; without sufficient excuse the plaintiffs delayed the prosecution of their suit so that a demurrer was not disposed of for more than a year and a half, and a trial on the merits was not had until more than three years had elapsed after the bringing of the action, during which time there was a settlement of assets and liabilities between the school districts affected, the defendant district making levies and collecting taxes, supplying school accommodations; providing transportation for pupils, and disposing of useless property; it is held: Plaintiffs have been guilty of such laches as preclude them from asserting the invalidity of the annexation proceedings. *Weiderholt v. Lisbon Special School District*, 561.

SPECIFIC PERFORMANCE.

1. In order to be enforceable in equity there must have been a clear, mutual understanding, and a positive assent on both sides as to the terms of the

SPECIFIC PERFORMANCE—continued.

- contract: i. e., there must be a complete contract, finally concluded and agreed upon. *Pollak v. Roberts*, 150.
2. Specific performance will not be enforced unless the contract is just and reasonable and made for an adequate consideration. In this case the proof fails to show any completed contract. *Carey v. Campbell*, 273.

TAXATION.

1. Chapter 230 of the Session Laws of 1917, which imposes an annual tax of three mills on each dollar of the cash value of moneys and credits, is not applicable to moneys and credits arising out of interstate commerce transactions of the plaintiffs, who are foreign corporations not engaged in doing an intrastate business. *Farwell, Ozmun, Kirk & Co. v. Wallace*, 173.
2. Chapter 229 of the Session Laws of 1919, which fixes the situs of property for purposes of taxation, and thus defines the taxing jurisdiction of the state, does not operate to render taxable the moneys and credits of the plaintiffs which are derived from interstate commerce in the manner stated in the opinion. *Farwell, Ozmun, Kirk & Co. v. Wallace*, 173.
3. Chapter 222 of the Session Laws of 1919, which provides, among other things, for an excise tax on capital stock and bonds of foreign corporations engaged in business within this state during the previous calendar year, is construed and held not applicable to corporations engaged solely in interstate commerce. *Farwell, Ozmun, Kirk & Co. v. Wallace*, 173.
4. Chapter 230 of the Session Laws of 1917, which provided for the taxation of moneys and credits at an annual flat rate of three mills on each dollar of the cash value, having been repealed by chapter 62 of the Session Laws of the Special Session of 1919, the latter providing that the act should not be construed to invalidate or discharge any tax theretofore levied or assessed, it is held that the plaintiffs in respect to the business described in the complaint, are not liable for the tax sought to be imposed. *Capital Trust & Savings Bank v. Wallace*, 182.

TORTS.

1. In an action to recover damages which the plaintiff claims to have suffered by reason of oppressive conduct of the defendant in connection with a loan transaction had between the plaintiff and a corporation of which the defendant was president and manager, it is held, for reasons stated in the opinion, that the plaintiff failed to allege and prove a cause of action. *Mitchell v. Youmans*, 92.

UNITED STATES.

1. That the Fort Totten Military Reservation has been abolished by the Federal

UNITED STATES—continued.

Government, and that the lands formerly included therein are no longer within the exclusive governmental and political control of the United States. *La Duke v. Melin*, 349.

VENDOR AND PURCHASER.

1. Where a vendor, under a contract for deed which contained no acceleration clause, attempted to cancel the contract under chapter 151, Sess. Laws 1917, declaring in the notice that the contract would be canceled unless the whole of the remaining instalments were paid within six months, it appearing that the defendant had made substantial payments and that at the time of the first attempted cancellation the only default was in the non-payment of taxes; and where, after the expiration of six months from the first notice, the vendor served notice upon the purchaser to vacate the premises and began forcible entry and detainer proceedings in justice court, which were transferred to the district court; and where, upon an *ex parte* showing, the district court appointed a receiver to take possession of the property, collect rents, etc., it is held:
 - (1) The order appointing the receiver was improvidently made.
 - (2) Though an order appointing a receiver be improvidently made, it may not be violated with impunity, and one may be adjudged guilty of contempt for its violation. *Glein v. Miller*, 1.
2. There are practically no questions presented in this case, except questions of fact. See & Pence Company, by a written contract, sold to one Gorthy and one Nelson a certain 480-acre tract of land, described in the contract. Subsequently, See & Pence Company deeded the land to John W. See, subject to the conditions of the contract. Gorthy sold his interest to Nelson, for \$3,200, for which he took several promissory notes, due and payable at specific dates. He claims that Nelson, to secure the notes, assigned the contract to him, and that he assigned it to one Jones, as manager for the plaintiff, from whom Gorthy claims to have purchased other land. He claims that, in that condition, the assignment exhibit "H" was deposited with the Stutsman County Bank; that thereafter the name Jones was erased, and the name Nelson was wrongfully and fraudulently inserted. The trial court found as a fact that Gorthy, for a good and valuable consideration, assigned, transferred, and delivered to Carl Nelson, said assignment, exhibit "H", and that said Carl Nelson, for valuable consideration, assigned, transferred, and delivered the same, by an instrument in writing, to Loran Nichols, who purchased the contract, in good faith, and without notice of knowledge of the rights or claims of any other party or parties therein. It is held, the evidence sustains this finding of the trial court. *Posey v. See & Pence Co.* 279.
3. Other facts and circumstances exist in the case, and are fully discussed in

VENDOR AND PURCHASER—continued.

- the opinion. It is held, there is no reversible error of finding of fact, nor reversible error of law committed by the trial court. Posey v. See & Pence Co. 279.
4. It is held, that the judgment has substantial support in the evidence. Posey v. See & Pence Co. 279.

WILLS.

1. In an action brought to revoke the probate of a will on the ground that it was not properly executed, where the evidence showed that the testatrix, a woman eighty-one years of age, signed the purported will by mark the day before her death; that she did not request the witnesses to sign; that they attached their signatures in a room not immediately adjacent to that in which testatrix was lying; and that the testatrix was facing the opposite direction and could not readily, in her then position and condition, have observed the act of attestation; it is held: That the evidence is at least sufficient to form a question of fact for the jury as to whether or not the will was witnessed in the presence of the testatrix. Ostlund v. Ecklund, 76.
2. Where it appeared that the petitioner had been interested in a prior attempt to contest the probate of the will, but did not discover the facts with reference to the attestation until after the will was probated, he is not precluded from petitioning on the ground of the newly discovered facts. Ostlund v. Ecklund, 76.
3. Where a will is contested on the ground that it was not executed in the manner required by statute, it was not error to exclude declarations of intention made two hours before the purported will was executed. Ostlund v. Ecklund, 76.
4. Where a special verdict finds a fact which is conclusive against the validity of the will, it is sufficient to support a judgment revoking the probate of the will, and the proponent of the will is not prejudiced by the failure to submit other questions. Ostlund v. Ecklund. 76.

WITNESSES.

1. For reasons stated in the opinion, it is held that the court did not err in permitting certain questions to be propounded to defendant on cross-examination. Kuhn v. Marquart, 482.

